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code of federal regulations

Public Welfare

item 572-C
COMPLETED

45

PARTS 1 TO 199
Revised as of October 1, 1981

022-003-94674-8

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code of federal regulations

Public Welfare

45

PARTS 1 TO 199

Revised as of October 1, 1981

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Cite this Code CFR

thus: 45 CFR 1.1

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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EFFECTIVE DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date.

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CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised semiannually as of January 1 and July 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of Presidential documents appears at the end of each compilation of Title 3, The President.

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A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

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For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

JOHN E. BYRNE,
Director,
Office of the Federal Register.

October 1, 1981.

THIS TITLE

Title 45—PUBLIC WELFARE is composed of four volumes. The parts in these volumes are arranged in the following order: Parts 1-199, 200-499, 500-1199, and 1200 to end. These volumes represent all current regulations codified under this title of the CFR as of October 1, 1981.

Those amendments to Part 801—Voting Rights Program, Appendixes A, B, and D, which apply to Texas also appear in Spanish following Appendix D.

For this volume Gary J. Bruegging was Chief Editor. The Code of Federal Regulations publication program is under the direction of Martha B. Girard, assisted by Robert E. Jordan.

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(1964 through 1972)

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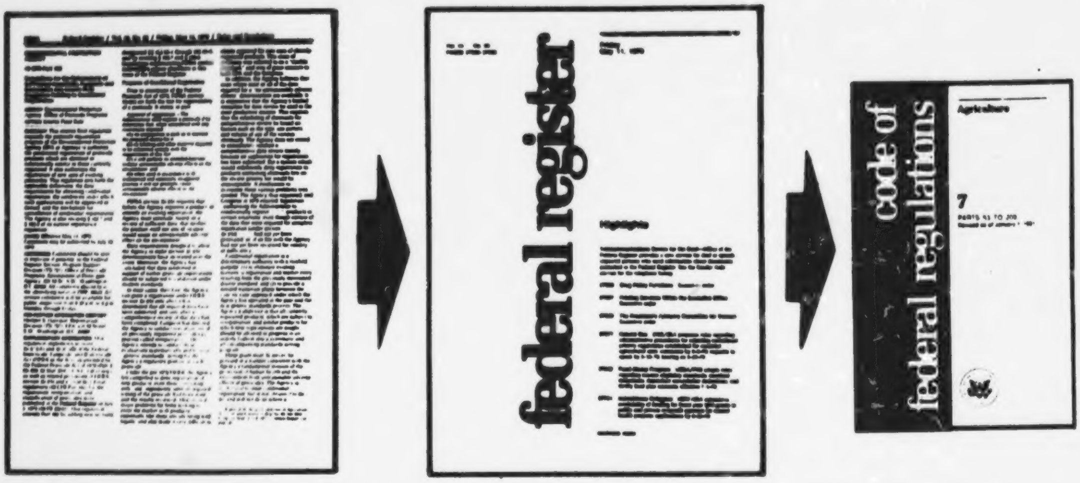

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Title 45—Public Welfare

(This book contains Parts 1 to 199)

Part

SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES; GENERAL ADMINISTRATION 1

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SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL ADMINISTRATION

Note: Nomenclature changes affecting Subtitle A appear at 45 FR 53806, August 13, 1980.

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PART 1—HHS'S REGULATIONS

§ 1.1 Location of HHS regulations.

Regulations for HHS's programs and activities are located in several different titles of the Code of Federal Regulations:

- Regulations having HHS-wide application or which the Office of the Secretary administers are located in Parts 1-99 of Title 45.
- Health regulations are located at parts 1-399 of Title 42.
- Health care financing regulations are located at parts 400-499 of Title 42. These include regulations for Medicare and Medicaid.
- Human development services regulations are located at Parts 200-299 and 1300-1399 of Title 45. These include regulations for Head Start, social services, social and nutrition services for older persons, rehabilitative services, developmental disabilities services, Native American programs, and various programs relating to families and children.
- Social Security regulations are located at 400-499 of Title 20.
- Food and Drug regulations are located at parts 1-1299 of Title 21.
- Education regulations are located at parts 100-199 and 1300-1599 of Title 45.
- Procurement (contract) regulations are located at Chapter 3 of Title 41.

Each volume of the Code contains an index of its parts.

(5 U.S.C. 301)

[45 FR 61598, Oct. 26, 1979]

§ 1.2 Subject matter of Office of the Secretary regulations in Parts 1-99.

This subject matter of the regulations in Parts 1-99 of this title includes:

- *Civil rights/nondiscrimination:* Parts 80, 81, 83, 84, 86, 90
- *Protection of human subjects:* Part 46
- *Day care requirements:* Part 71
- *Information, privacy, advisory committees:* Parts 5, 5a, 5b, 11, 17, 99
- *Personnel:* Parts 50, 57, 73, 73a
- *Grants administration, property, hearing rights:* Parts 10, 12, 15, 16, 74, 75, 95
- *Claims:* Parts 30, 35
- *Inventions and patents:* Parts 6, 7, 8
- *Miscellaneous:* Parts 3, 4, 9, 19, 67

(5 U.S.C. 301)

[45 FR 61598, Oct. 26, 1979]

PART 2—[RESERVED]

PART 3—CONDUCT OF PERSONS AND TRAFFIC ON CERTAIN FEDERAL ENCLAVES

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3.3 Compliance.
3.4 False reports and reports of injury or damage.
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Subpart C—Facilities and Grounds

3.41 Admission to grounds or facilities.
3.42 Nuisances and disturbances.
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3.44 Removal of property.

Subpart D—Penalties

3.61 Penalties.

AUTHORITY: Secs. 1-5, 62 Stat. 281, as amended, 75 Stat. 574 (40 U.S.C. 318-318d); Sec. 205, 63 Stat. 389, as amended, 64 Stat. 591, 76 Stat. 414 (40 U.S.C. 486); Delegations of Authority, 33 FR 604, 41 FR 19162, 34346, 44 FR 15774.

SOURCE: 45 FR 41820, June 20, 1980, unless otherwise noted.

Subpart A—General

§ 3.1 Definitions.

As used in this part:

"Director" means the officer in charge of an enclave covered by this part.

"Enclave" means, respectively:

(a) The area, containing about 307 acres, acquired by the United States in several parcels in the years 1935 through 1949, comprising the National Institutes of Health (NIH) located in Montgomery County, Maryland, over which the United States acquired exclusive criminal jurisdiction under the Act of March 31, 1953, chapter 158 (Maryland Code Annotated, Article 96, section 34 (1979)).

(b) The area, containing about 24 acres acquired in several parcels in the years 1903, 1930 and 1931, comprising the Staten Island Public Health Service Hospital located in the Borough and County of Richmond, City of New York, New York, over which the United States acquired exclusive criminal jurisdiction under chapter 107, New York Laws of 1903, and a deed of cession dated October 13, 1931 under chapter 59, New York Laws of 1909, as amended (See McKinney's New York Consolidated Laws, Annotated, Book 56, Section 26(2) (1952); New York Laws of 1932, Appendix page 1493).

"Law enforcement officer" means a uniformed guard or a U.S. Special Policeman appointed under a delegation of authority under 40 U.S. Code 318; any other Federal law enforcement officer; and any other person whose law enforcement services are secured by contract or upon request from a State or local law enforcement agency.

§ 3.2 Applicability.

(a) The regulations in this part apply to all areas in the enclave and to all persons on or within the enclave, except as otherwise provided. They provide penal sanctions as prescribed in § 3.61, and are in addition to administrative rules prescribed by Directors for their respective enclave under 5 U.S. Code 301. They supplement those penal provisions of Title 18, U.S. Code, relating to Crimes and Criminal Procedure, which apply without regard to the place of the offense and those penal provisions which apply in areas under the special maritime and territorial jurisdiction of the United States, as defined in 18 U.S. Code 7. However, they supersede those provisions of State law which are made Federal criminal offenses by virtue of the Assimilative Crimes Act (18 U.S. Code 13) to the extent that they are in conflict with the regulations in this part. State and local criminal laws are applicable as such only to the extent that authority in that regard has been reserved to the State by the State consent or cession statute or vested in the State by Federal statute.

(b) The provisions of this part do not apply to occupants, their visitors and other authorized persons in areas used as living quarters (1) when specifically made inapplicable, and (2) in the case of the following provisions: § 3.24 Parking permits; § 3.26 Servicing of vehicles; and § 3.43(c) Hobbies and sports.

§ 3.3 Compliance.

A person must comply with the regulations in this part; with all official signs; and with the lawful directions or orders of a law enforcement officer or other authorized person, including traffic and parking directions.

§ 3.4 False reports and reports of injury or damage.

A person may not knowingly give any false or fictitious report concerning an accident or violation of the regulations in this part to any person properly investigating such an accident or alleged violation. All incidents resulting in injury to persons or damage to property in excess of $50.00 in value must be reported by the persons involved as soon as possible to the law enforcement office.

§ 3.5 Identification.

At the request of a law enforcement officer, a person must provide identification by exhibiting satisfactory credentials (such as a driver's license) to the law enforcement officer.

§ 3.6 Lost and found articles.

Lost articles which are found on the enclave, including money and other personal property, together with any identifying information, must be deposited at the law enforcement office or with an office which may likely have some knowledge of ownership. If the article is deposited with an office other than the law enforcement office and the owner does not claim it within 30 days, it shall be deposited at the law enforcement office for further disposition as provided by law. (*See* 41 CFR Part 101-48).

§ 3.7 Nondiscrimination.

To the extent not otherwise prohibited by 18 U.S. Code 245, a person may not discriminate by segregation or otherwise against another person because of age, color, creed, handicap, national origin, race or sex, in furnishing or by refusing to furnish to that person the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided within the enclave.

Subpart B—Traffic Regulations

§ 3.21 Emergency vehicles.

A person must yield the right of way to an emergency vehicle operating its siren or flashing lights.

§ 3.22 Inspection of driver's license and registration.

A motor vehicle operator must exhibit for inspection a valid operator's license and valid motor vehicle registration upon the request of a law enforcement officer.

§ 3.23 Parking.

(a) No person may stand (vehicle stopped with or without an occupant) or park a motor or other vehicle:

(1) In a lane, space, or area not designated by sign for parking, except that vehicles may be left standing in areas where standing, but not parking, is permitted;

(2) On a sidewalk;

(3) Within an intersection or crosswalk;

(4) Within 10 feet of a fire hydrant, 5 feet of a driveway or 30 feet of a stop sign or traffic control signal;

(5) In a double-parked position;

(6) At a curb painted yellow;

(7) On the side of a street facing oncoming traffic;

(8) In a position that would obstruct traffic;

(9) For a period in excess of 24 hours, except at living quarters or with specific permission of the law enforcement office.

(b) A person must park bicycles, motorbikes, and similar vehicles only in designated areas, and may not bring these vehicles inside buildings.

(c) Visitors must park in areas identified for that purpose by posted signs or similar instructions, such as "visitor parking" and "reserved for visitors."

(d) A person may not drive or park an unauthorized motor vehicle on a grassy area without the approval of the law enforcement office.

[45 FR 41820, June 20, 1980; 46 FR 30343, June 8, 1981]

§ 3.24 Parking permits.

Except for visitors parking in visitor parking areas, a person may not park a motor vehicle without displaying a parking permit valid for that location. The Director may revoke any parking permit for violation of this section, or any provision of this part.

§ 3.25 Pedestrian traffic.

A driver must yield the right-of-way to a pedestrian crossing a street in a marked crosswalk or intersection.

§ 3.26 Servicing of vehicles.

A person may not wash, polish, change oil, lubricate, or make nonemergency repairs on a privately-owned vehicle.

§ 3.27 Signs.

A driver of a vehicle must comply with posted traffic and parking signs.

§ 3.28 Speed limit.

The speed limit is 20 miles per hour, unless otherwise posted. A driver of a vehicle may not exceed the speed limit.

§ 3.29 Unattended vehicles.

A person may not leave a motor vehicle unattended with the engine running, the ignition unlocked or locked with the key in a readily accessible place in the vehicle, or the brakes ineffectively set.

§ 3.30 Bicycles.

A person may not operate a bicycle, motorbike, or similar vehicle without a horn or other warning device, and, if the vehicle is operated between dusk and dawn, it must be equipped with an operating headlight, and taillight or reflector.

Subpart C—Facilities and Grounds

§ 3.41 Admission to grounds or facilities.

The enclave is officially closed to the public except during normal working and visiting hours or for approved public events. The Director may also officially close all or part of the enclave in emergency situations and at other times the Director deems necessary to insure the orderly conduct of Government business. When the enclave is closed to the public, admission is restricted to employees and other authorized persons who may be required to display Government credentials or other identification when requested by a law enforcement officer and may be required to sign a register.

§ 3.42 Nuisances and disturbances.

The following acts by a person are prohibited: any unwarranted loitering, disorderly conduct, littering, or disposal of rubbish in an unauthorized manner; the creation of any hazard to persons or property; the throwing of articles of any kind from or at a building; the climbing upon any part of a building for other than an authorized purpose; the loud playing of radios or other similar devices; and rollerskating, skateboarding, sledding or similar activities, except in officially designated areas.

§ 3.43 Other restricted activities.

(a) *Explosives and weapons.* A person, other than a law enforcement officer, may not carry, transport, or otherwise possess, firearms, other dangerous or deadly weapons, explosives, or items intended to be used to fabricate an explosive or incendiary device, either openly or covertly. The Director may grant specific approval for the possession of firearms for collections or hunting, the delivery or removal of money, or the protection of display of valuable materials and similar purposes.

(b) *Gambling.* A person may not operate a gambling device, conduct a lottery or pool, sell or purchase a numbers ticket, or take or place a bet, except that participation in living quarters in games for money or otherwise for incidental recreational purposes is authorized. This prohibition shall not apply to the vending or exchange of chances in lotteries authorized under State law by licensed vendors and in accordance with approved State procedures.

(c) *Hobbies and sports.* Hobbies and sports may be undertaken only in designated areas or as approved by the Director.

(d) *Intoxicants and narcotics.* A person may not sell, consume, or use intoxicating beverages, narcotics or other similar drugs, except in connection with official duties, in the course of professional treatment, or, in the case of consumption or use of intoxicating beverages, in living quarters, or as otherwise authorized by the Director. A person may not operate a motor vehicle while under the influence of an intoxicating beverage or drug.

(e) *Pets and other animals.* A person may not bring on the enclave any cat, dog, or other animal except for authorized purposes. This prohibition does not apply to bringing on the enclave and the retention of domestic pets at living quarters or to the exercise of such pets under leash or other appropriate restraints. The use of a dog by a handicapped person to assist that person is authorized.

(f) *Photography.* Subject to the limitations provided in this paragraph, a person may take photographs for personal or news purposes without prior approval on the grounds of the enclave or in entrances, lobbies, foyers, corridors, and auditoriums of facilities when used for public meetings, except when contrary to security regulations, or where prohibited by appropriate signs. Photographs for advertising or commercial purposes are subject to the advance written permission of the Director. A person may take photographs of a patient only with the informed consent of the patient (or the natural or legal guardian) and of the Director, or, with respect to NIH, the Director of the Clinical Center.

§ 3.44 Removal of property.

A person may not remove Federal property from the enclave or any building on the enclave without a property pass, signed by an authorized property custodian, which specifically describes the items to be removed. In an emergency, when the property custodian is not available, a law enforcement officer may approve removal of Federal property if, after consulting with the administrative officer or other appropriate official, the law enforcement officer is authorized by that official to do so. Privately-owned property, other than that ordinarily carried on one's person, may be removed only under this property pass procedure, or upon properly establishing ownership of the property to a law enforcement officer. Packages, briefcases, or other containers brought within the enclave are subject to inspection while on, or being removed from, the enclave.

Subpart D—Penalties

§ 3.61 Penalties.

A person found guilty of violating any provision of the regulations in this part is subject to a fine of not more than $50 or imprisonment of not more than thirty days, or both, for each violation (40 U.S. Code 318c).

PART 4—SERVICE OF PROCESS

§ 4.1 Service of process required to be served on or delivered to Secretary.

Summons, complaints, subpoenas, and other process which are required to be served on or delivered to the Secretary of Health and Human Services shall be delivered to the Deputy General Counsel, the Secretary to the Deputy General Counsel, or the Secretary to the General Counsel, by mail at 330 Independence Avenue SW., Washington, D.C. 20201 or by personal service at 200 Independence Avenue, SW., Washington, D.C. 20201. The persons above designated are authorized to accept service of such process.

(5 U.S.C. 301)

[42 FR 22145, May 2, 1977]

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC PURSUANT TO PUBLIC LAW 90-23

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5.85 Decisions on review.

APPENDIX

AUTHORITY: 81 Stat. 54; 7 U.S.C. 2243, 5 U.S.C. 552.

SOURCE: 32 FR 9315, June 30, 1967, unless otherwise noted.

Subpart A—Definitions

§ 5.1 Act.

As used in this part, "Act" means section 552 of Title 5, United States Code, as amended by Public Law 90-23, codifying the Act of July 4, 1966, sometimes referred to as the "Public Information Act".

§ 5.2 Department.

As used in this part, "Department" means the Department of Health and Human Services which consists of the Office of the Secretary and all components of the Department.

[40 FR 26512, June 24, 1975]

§ 5.3 Principal operating components.

(a) Principal operating components are those major program organizations which report to the Secretary. There are five principal operating components: The Public Health Service, the Office of Human Development, the Education Division, the Social and Rehabilitation Service, and the Social Security Administration.

(b) The Public Health Service is comprised of the Office of the Assistant Secretary for Health, the Alcohol, Drug Abuse, and Mental Health Administration, Center for Disease Control, the Food and Drug Administration, the Health Resources Administration, the Health Services Administration, and the National Institutes of Health.

(c) The Education Division is comprised of the Office of the Assistant Secretary for Education, the Office of Education and the National Institute of Education.

(d) The Social Security Administration includes intermediaries and carriers performing functions under agreements entered into pursuant to sections 1816 and 1842 of the Social Security Act.

[40 FR 26512, June 24, 1975]

§ 5.4 Heads of Office of the Secretary, Principal Operating Components, PHS Agencies and Education Agencies.

The heads of the Office of the Secretary and principal operating components are as follows:

Office of the Secretary—Secretary of Health and Human Services
Public Health Service—Assistant Secretary for Health
Office of Human Development—Assistant Secretary for Human Development
Education Division—Assistant Secretary for Education
Social and Rehabilitation Service—Administrator, Social and Rehabilitation Service
Social Security Administration—Commissioner of Social Security

The Secretary has delegated to the Assistant Secretary for Administration and Management those responsibilities vested by the regulation in heads of principal operating components.

[40 FR 26512, June 24, 1975]

§ 5.5 Records.

As used in this part:

(a) "Record" includes books, brochures, punch cards, magnetic tapes, paper tapes, sound recordings, maps, pamphlets, photographs, slides, motion pictures, or other documentary materials, regardless of physical form or characteristics, made or received by the Department in pursuant of Federal law or in connection with the transaction of public business and preserved by the Department as evidence of the organization, functions, policies, decisions, procedures, operations, programs, or other activities.

(b) "Record" does not include: Objects or articles such as tangible exhibits, models, equipment, or processing materials; or formulae, designs, drawings, or other items of valuable property; books, magazines, pamphlets, or other reference material in formally organized and officially designated libraries of the Department, which are available under the rules of the particular library concerned.

Subpart B—What Records Are Available

§ 5.11 Purpose and scope.

This part constitutes the regulation of the Department respecting the availability to the public, pursuant to the Act, of records of the Department. It informs the public what records are generally available. The components of the Department may issue implementing regulations which are consistent with this part. To the extent that they are consistent, existing implementing regulations remain in full force and effect.

[40 FR 26512, June 24, 1975]

§ 5.12 General policy.

The Department's policy is one of the fullest responsible disclosure limited only by the obligations of confidentiality and the administrative necessities recognized by the Act. Unless otherwise exempted from disclosure pursuant to law, records of the Department shall be available for inspection and copying in accordance with this part. The establishment of records search and copying services in especially designated centers shall supplement, and in no way curtail, the free access of public inquirers throughout the Department.

§ 5.13 Records available.

(a) *Publication in the Federal Register.* The following shall be published in the FEDERAL REGISTER:

(1) Descriptions of the Department's central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;

(2) Statements of the general course and method by which the Department's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) Rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Department;

(5) Every amendment, revision, or repeal of the foregoing.

(b) *Agency opinions and orders.* The Department shall, in accordance with this part and applicable regulations, make available for public inspection and copying:

(1) All final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases (initial decisions and reconsiderations thereof in matters that are not the result of administrative proceedings such as hearings or formal appeals—for example, initial decisions and reconsiderations on claims for benefits—are not "opinions and orders in the adjudication of cases");

(2) Those statements of policy and interpretations which have been adopted by the agency and are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect any member of the public;

unless such materials are promptly published and copies offered for sale.

The Department shall maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is required by this paragraph (b) to be published or made available.

(c) *Availability of records on request.* In addition to the records made available pursuant to paragraphs (a) and (b) of this section, the Department shall, upon request for identifiable records made in accordance with this part, make such records available to any person, unless it is determined that such records must be withheld from disclosure and are exempt under subsection (b) of the Act and Subpart F of this part.

§ 5.14 Published documents.

Published records of the Department, whether or not available for purchase, shall be made available for examination in or through the appropriate Information Centers.

§ 5.15 Creation of records.

Records are not required to be created by compiling selected items from the files, and records are not required to be created to provide the requester with such data as ratios, proportions, percentages, per capitas, frequency distributions, trends, correlations, and comparisons. If such data have been compiled and are available in the form of a record, the record shall be made available as provided in this part.

§ 5.16 Deletion of identifying details.

Whenever any final opinion, order, or other materials required to be made available pursuant to subsection (a)(2) of the Act relates to a private party or parties and the release of the name or names or other identifying details will constitute a clearly unwarranted invasion of personal privacy, the record shall be published or made available with such identifying details left blank, or shall be published or made available with obviously fictitious substitutes and with a notification such as the following as a preamble:

> Names of parties and certain other identifying details have been removed [and fictitious names substituted] in order to prevent a clearly unwarranted invasion of the personal privacy of the individuals involved.

§ 5.17 Records in record centers.

When a request is made for identifiable records of the Department which have been stored in the National Archives or other record centers of the General Services Administration, but would otherwise be available under this Act, such records shall be requested by the Department for the requester.

§ 5.18 Destroyed records.

Records of specified form or character are destroyed after the lapse of time specified in the Records Disposal Act of 1943 (44 U.S.C. 366-380), the Federal Property Management Regulations (41 CFR Part 101-111), and the Records Control Schedules (Appendices A and B of the Department of Health and Human Services Records Management Manual).

§ 5.19 Records of other departments and agencies.

Requests for records which originated in or concern matters which originated in another Department or Government agency may be forwarded to the Department or agency primarily concerned and the requester so notified.

Subpart C—Where Information Centers Are Located

§ 5.31 Information centers or facilities.

(a) The Department maintains its Central Information Center at the following location:

Department of Health and Human Services,
North Building, 330 Independence Avenue, S.W., Washington, D.C. 20201.

This Center shall include a records reference and copying service, and shall have as its primary goal the provision, as far as practicable, of information service covering the programs and activities of the Department.

(b) The Department maintains an Information Center or information facilities in each of its Regional Offices as follows:

Region I—John F. Kennedy Federal Building, Boston, Mass. 02203.

Region II—42 Broadway, New York, N.Y. 10004.

Region III—3535 Market Street, Philadelphia, Pa. 19104

Region IV—50 Seventh Street NE., Atlanta, Ga. 30323.

Region V—300 South Wacker Drive, Chicago, Illinois 60606

Region VI—1114 Commerce Street, Dallas, Tex. 75202.

Region VII—601 East 12th Street, Kansas City, Mo. 64106.

Region VIII—Federal Office Building, 19th and Stout Streets, Denver, Colo. 80202.

Region IX—Federal Office Building, 50 Fulton Street, San Francisco, Calif. 94102.

Region X—Arcade Plaza Building, 1321 Second Avenue, Seattle, WA 98101.

(c) Centers are maintained for the principal operating components and their subsidiaries at the following locations:

Office of the Secretary	HHS North Building, 330 Independence Avenue SW., Washington, DC 20201.
Food and Drug Administration	Public Records and Documents Center, 5600 Fishers Lane, Rockville, Md. 20852
National Institutes of Health	Building No. 1, 9000 Rockville Pike, Bethesda, MD 20014.
Center for Disease Control	Center for Disease Control, Atlanta, Georgia 30333.
Health Resources Administration	Parklawn Building, 5600 Fishers Lane, Rockville, MD 20852.
Health Services Administration	Parklawn Building, 5600 Fishers Lane, Rockville, MD 20852.
Alcohol, Drug Abuse and Mental Health Administration	Parklawn Building, 5600 Fishers Lane, Rockville, MD 20852.
Office of Education	Federal Office Building No. 6, 400 Maryland Avenue SW., Washington, DC 20202.
Social Security Administration	Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235.
Social and Rehabilitation Service	Mary E. Switzer Building, 330 C Street, S.W., Washington, D.C. 20201
Saint Elizabeths Hospital, National Institute of Mental Health, Public Health Service.	Administration Building, St. Elizabeths Hospital, Martin Luther King, Jr., Avenue SE., Washington, DC 20032.
National Institute of Education	1200 19th Street, N.W., Washington, D.C. 20208.

(d) The operating agencies may establish such other information centers as they may hereafter determine. Upon the establishment of such additional center(s) the operating agency shall publish in the Federal Register a notice thereof, containing the address thereof, materials to be maintained therein, and the official who has a like responsibility to that of the Information Center Officers provided for in § 5.32 or § 5.53.

[32 FR 9315, June 30, 1967, as amended at 32 FR 14895, Oct. 27, 1967; 38 FR 22231, Aug. 17, 1973; 39 FR 28631, Aug. 9, 1974; 40 FR 26512, June 24, 1975]

§ 5.32 Information center officers.

(a) The Freedom of Information Officer shall serve as the Department's Central Information Center Officer and shall be responsible for determining whether records of the Office of the Secretary (including its staff offices) must be withheld from disclosure and shall have authority to deny requests for records of the Office of the Secretary.

(b) The Regional Information Center Officer in each Region shall have a like responsibility for records in his regional office. The Regional Information Center Officer in each Region shall be the Assistant Regional Director for Public Affairs.

(c) The Information Center Officer for each Information Center shall have a like responsibility for the records of his component. The Information Center Officer for the respective components shall be as follows:

Health Services Administration Center for Disease Control, Alcohol, Drug Abuse and Mental Health Administration, Health Resources Administration, and National Institutes of Health.	Freedom of Information Officer.
Food and Drug Administration	Assistant Commissioner for Public Affairs.
Office of Education	Assistant Commissioner for Public Affairs.
Social Security Administration	Assistant Commissioner for Public Affairs.
Social and Rehabilitation Service	Assistant Administrator for Public Affairs.
National Institute of Education	Assistant to the Director for Public Information.

[33 FR 18030, Dec. 4, 1968, as amended at 38 FR 22232, Aug. 17, 1973; 39 FR 28631, Aug. 9, 1974; 40 FR 26512, June 24, 1975]

§ 5.33 Duty hours.

The Information Centers shall be open to the public on regular work days during the regular duty hours of the installation where located.

§ 5.34 Material in the information centers.

Materials maintained in information centers need not be uniform in each center. A center will normally have materials particularly related to the component's programs and mission. Every effort will be made by an information center to obtain, upon request, other materials available in the Department.

[40 FR 26512, June 24, 1975]

Subpart D—Procedures for Requesting Access to Records

§ 5.51 Procedure.

(a) A request for any information or record may be made at (1) The Department's Central Information Center, (2) any Regional Office Information Center, or (3) any subsidiary Information Center. A request may also be made at any appropriate office of the Department.

(b) Requests made at the Central or a Regional Office Information Center for information or records not located there shall, if reduced to writing by the requester, be forwarded to the proper office. If a request is made at any other Center or office of the Department and the information or record is not located where the request is made, the requester shall be referred to the proper Center or office, or if the request is put in writing it may be forwarded to the proper office.

(c) A request should reasonably identify the requested record by brief description. Requesters who have detailed information which would assist in identifying the records requested are urged to provide such information in order to expedite the handling of the request. Envelopes in which written requests are submitted should be clearly identified as a Freedom of Information request.

(d) Determination of whether records will be released or withheld will be made within 10 working days from date of receipt in the office having custody of the records or the appropriate information center. This time may be extended by written notice for no longer than an additional 10 working days, only in unusual circumstances. Unusual circumstances mean:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

If such extension is made, the requester will be notified in writing with an explanation of why the extension was necessary and the date on which a determination will be made.

[40 FR 26512, June 24, 1975]

§ 5.52 Copies of records.

Copies of available records shall be produced as promptly as possible upon receipt of the fee therefor. Copying service shall be limited to not more than two copies of any single page, except that additional copies may be made where administrative considerations permit. Records which are published or available for sale need not be copied.

§ 5.53 Denial of request for records.

Written requests for inspection or copying of records shall be denied only by those officials listed in § 5.32, or their designees or as otherwise provided by regulation. Denials of requests shall be in writing and shall contain the reasons for the denial and provide the requester with appropriate information on how to exercise the right of appeal under Subpart G of this part. Such notification shall also set forth the names and titles or positions of each person responsible for the denial of such request if such person or persons is other than the appropriate Information Center Officer.

[40 FR 26513, June 24, 1975]

Subpart E—Fees

§ 5.60 Policy on fees.

It is the policy of the Department to provide routine information to the public without charge. Special information services involving a benefit that does not accrue to the general public shall be subject to the payment of fees which shall be fixed in amounts to recover the direct cost to the Government of providing such services. Fees will be charged for the following special services:

(a) Reproduction, duplication or copying of records;

(b) Certification or authentication of records;

(c) Searches for records.

[40 FR 18998, May 1, 1975]

§ 5.61 Fee schedules.

The fee schedule for the Department of Health and Human Services is as follows:

(a)(1) Search for records—three dollars per hour provided, however, that no charge will be made for the first half hour.

(2) Reproduction, duplication or copying of records—ten cents per page where such reproduction can be made by commonly available photocopying machines. However, the cost of reproducing records which are not susceptible to such photocopying, e.g. punch cards, magnetic tapes, blueprints, etc., will be determined on a case-by-case basis at actual cost.

(3) Certification or authentication of records—three dollars per certification or authentication.

(4) Forwarding material to destination—any special arrangements for forwarding which are requested by the requester shall be charged on an actual cost basis.

(5) No charge will be made where the total amount does not exceed five dollars.

(b) Waiver or reduction of the fees provided for in this subsection may be made upon a determination that such waiver or reduction is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

[40 FR 18998, May 1, 1975]

§ 5.62 Publication of fee schedules.

Fee schedules shall be published in the FEDERAL REGISTER by the Assistant Secretary for Administration for the Office of the Secretary and by the agency head for his operating agency. Schedules shall also be posted at the Information Centers and made available to the public when information is requested in writing.

[32 FR 9315, June 30, 1967, as amended at 32 FR 14895, Oct. 27, 1967]

§ 5.63 Searching records.

Fees for searching shall be computed as follows:

(a) A predetermined standard hourly rate for labor and personal services of employees of the Department. Such hourly rates shall be published in advance.

(b) Actual cost to the Government of materials, postage and other direct costs, plus indirect costs to the Government. Such costs shall be determined for each request, at the time of the request, allowing a reasonable period for the development of the estimate.

§ 5.64 Copying.

Fees for copy or duplicating services shall be set on a per page basis. The fee shall be maintained as a predetermined standard rate.

§ 5.65 Certification or authentication.

A fee for certification or authentication of records shall be set on a per document basis. The fee shall be on the basis of a predetermined standard rate. Where the request includes making a copy of the record to be certified, the applicable fee for copying will also be charged. Where the requester furnishes a copy of the document to be authenticated or certified which requires comparison with the record on file, a comparing fee based upon predetermined hourly rates will be applicable.

Subpart F—Availability of Specific Records

SOURCE: 38 FR 22232, Aug. 17, 1973, unless otherwise noted.

§ 5.70 Policy.

This subpart specifies the types of records which the Department shall, in keeping with its policy of fullest possible disclosure, make available for inspection and copying. For clarity and purposes of guidance, there are also set forth below the kinds or portions of records which generally will not be released, except as may be determined under § 5.74. The appendix to this part contains some examples of the kinds of materials which, in accordance with § 5.72, will generally be released and other materials which, in accordance with § 5.73, are not normally available. Implementing regulations (see § 5.11) may provide for disclosure of records, beyond that provided for in § 5.72. In the event that any record contains both information which is disclosable and that which is not disclosable under this regulation, the nondisclosable information will be deleted and the balance of the record disclosed.

[40 FR 26513, June 24, 1975]

§ 5.71 Protection of personal privacy and proprietary information.

As set forth with more particularity below, certain types of information in whatever record or document contained shall not be disclosed where disclosure would be inconsistent with individual rights of personal privacy or would violate obligations of confidentiality.

(a) Except to the extent specifically otherwise provided by implementing regulations (see § 5.11), no disclosure will be made of information of a personal and private nature, such as information in personnel and medical files, in welfare and social security records and any other information of a private and personal nature.

(b)(1) Except as provided in paragraph (b)(2) of this section, information concerning the identity, diagnosis, prognosis or treatment of any patient, obtained from records or entries in records maintained in connection with the performance of any drug abuse prevention function authorized or assisted under the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1175) or any act amended by that Act, will not be disclosed except as provided in section 408 of that Act and the regulations issued pursuant thereto by the Special Action Office for Drug Abuse Prevention (21 CFR Part 1401). Those regulations are incorporated herein by reference and made a part hereof as if fully set forth herein.

(2) Information covered under paragraph (b)(1) of this section which is obtained by the Department or any person, agency or organization with whom the Social Security Administration has entered into an agreement to perform certain functions in the administration of the Social Security Act and which is in any way related to, or is necessary to, or is used in or in connection with the administration of the Social Security Act, will not be disclosed except as provided under section 1106 of the Social Security Act (42 U.S.C. 1306) and the regulations of the Social Security Administration promulgated thereunder (20 CFR Part 401 et seq.), and under section 408 of the Drug Abuse Office and Treatment Act and the regulations of the Special Action Office for Drug Abuse Prevention. (21 CFR Part 1401)

(c) Except to the extent specifically otherwise provided by regulations of operating agencies, information having a commercial or financial value and in which the person providing the information has a proprietary interest will not be disclosed if it is in fact confidential. In determining whether such information is in fact confidential, consideration may be given to such factors as (1) the general custom or usage in the occupation or business to which the information relates that it be held confidential, (2) the number and situation of the individuals who have access to such information, (3) the type and degree of risk of financial injury to be expected if disclosure occurs, and (4) the length of time such information should be regarded as retaining the characteristics noted above.

(d) Information obtained by the Department from any individual or organization, who furnishes it in reliance upon a provision for confidentiality authorized by applicable statute or regulation, will not be disclosed. This subpart does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Department.

This section does not preclude use of nondiscloseable records or information from such records for authorized program purposes, including law enforcement purposes and litigation. Release of information of the nature described in this section to the individual or the organization to whom the information pertains or to an authorized representative of either will not be deemed a disclosure within the meaning of this part.

[32 FR 9315, June 30, 1967, as amended at 39 FR 28631, Aug. 9, 1974; 40 FR 18998, May 1, 1975; 40 FR 26513, June 24, 1975]

§ 5.72 Records available.

The following records of the Department shall, subject to the exceptions set forth in §§ 5.71 and 5.73, be available upon request for inspection and copying.

(a) *Correspondence.* Correspondence, relating to or resulting from the conduct of the official business of the Department, between the Department and individuals or organizations which are not agencies within the meaning of 5 U.S.C. 551(1) and 552(e).

(b) *Records pertaining to grants.* (1) Portions of funded initial research grant applications and portions of continuation, renewal or supplemental grant applications, whether funded or not, including interim progress reports and other supporting documents submitted by applicants, which are not otherwise exempted from disclosure by this subpart.

(2) Grant award documents.

(3) All State plans, amendments, and supplements thereto, including applications for the waiver of any provision thereof whether acted upon by the Department or not.

(c) *Contracts.* (1) Contract instruments.

(2) Portions of offers reflecting final prices submitted in negotiated procurements.

(d) *Reports on grantee, contractor, or provider performance.* Final reports of audits, surveys, reviews, or evaluations by, for, or on behalf of the Department, of performance by any grantee, contractor, or provider under any departmentally financed or supported program or activity, which reports have been transmitted to the grantee, contractor, or provider. However, reports subject to the provisions of 20 CFR Parts 401 and 322 will be available only after 30 days have elapsed following transmittal of the report to the provider.

(e) *Research, development, and demonstration project records.* The reports of a grantee or a contractor of the performance under any research, development, or demonstration project, records, other than reports, produced in such projects, such as films, computer software, other copyrightable materials and reports of inventions, will be available, except that considerations relating to obtaining copyright and patent protection may require delay in disclosure for such period as necessary to accomplish such protection. Disclosure of records which are copyrightable or which reflect patentable inventions shall not confer upon the requester any license under any copyright or patent without regard to the holder or owner thereof.

[32 FR 9315, June 30, 1967, as amended at 39 FR 28631, Aug. 9, 1974; 40 FR 18998, May 1, 1975; 40 FR 26513, June 24, 1975]

§ 5.73 Records not available.

The following types of records or information contained in any record, in addition to those prohibited by law from disclosure, are not available for inspection or copying, any provision of § 5.72 notwithstanding:

(a) *Intra-agency and inter-agency communications.* Communications within the Department other than those described in § 5.72(d) or between the Department or any other agency within the meaning of 5 U.S.C. 551(1) and 552(e), to the extent they reflect the views or judgment of the writer or of other individuals. If disclosure of any factual portion of the communication would indicate the views or judgment being withheld from disclosure, then such factual portions will also be withheld.

(b) *Investigatory files.* Investigatory files compiled for law enforcement purposes to the extent that production of such records would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trail or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(5) disclose investigative techniques and procedures or (6) endanger the life or physical safety of law enforcement personnel. For the purpose of this section "enforcement action" means any authorized action intended to abate, prevent, counteract, deter, or terminate violations of law and includes action involving possible civil, criminal, or administrative sanctions whether such sanctions involve adversary proceedings or other procedures, such as termination of benefits, protective measures, etc.

[40 FR 26513, June 24, 1975]

§ 5.74 Further disclosure.

(a) Any official listed in § 5.4 and in the case of the Office of the Secretary, the Assistant Secretary for Administration and Management or their designees may in particular instances, except where prohibited by law, disclose documents or portions of documents described in § 5.73 if he determines that disclosure is in the public interest and is consistent with obligations of confidentiality and administrative necessity.

(b) In making such a determination, consideration may be given to the Department's responsibilities under law for dissemination to the public of information relating to public health, safety of products or services, education, and welfare.

(c) When such determination has been made, the particular document or portion of document to which it relates shall thereafter be available upon request for inspection and copying: *Provided however,* That use of nondiscloseable records or information from such records for authorized program purposes, including law enforcement purposes and litigation is not a disclosure within the meaning of this section.

[38 FR 22232, Aug. 17, 1973, as amended at 40 FR 26513, June 24, 1975]

Subpart G—Administrative Review

§ 5.80 Review of denial of a record.

This subpart provides for the review of a denial, pursuant to § 5.53, of a written request for inspection or copying of a record.

§ 5.81 Time for initiation of request for review.

A person whose request has been denied may initiate a review by filing a request for review within (a) 30 days of receipt of the determination to deny or (b) within 30 days of receipt of records which are in partial response to his request if a portion of a request is granted and a portion denied, whatever is later.

[40 FR 26513, June 24, 1975]

§ 5.82 By whom review is made.

(a) Requests for review of denials should be addressed to the Assistant Secretary for Administration and Management or his designee with respect to records of the Office of the Secretary and to the officials listed in § 5.4 with respect to records of their respective principal operating components.

(b) The decision on review, if adverse to the requester, shall be made only with the concurrence of the Assistant Secretary for Public Affairs or his designee and after consultation with the General Counsel or his designee.

[40 FR 26513, June 24, 1975]

§ 5.83 Contents of request for review.

The request for review shall include a copy of the written request and the denial.

§ 5.84 Consideration on review.

Review shall be considered on the basis of the written record including any written argument submitted by the requester.

§ 5.85 Decisions on review.

(a) Decisions on review shall be in writing within 20 working days from receipt of the request for review. Extension of the time limit may be granted to the extent that the maximum 10-day limit on extensions has not been exhausted on the initial determination. Such extension may only be granted for the reasons enumerated in § 5.51(d).

(b) The decision, which constitutes final action of the Department, if adverse to the requester shall be in writing, stating the reasons for the decision, and advising the requester of the right to judicial review of such decision.

(c) Failure to comply with time limits set forth in § 5.51 or in this subsection constitutes an exhaustion of the requester's administrative remedies.

[40 FR 26513, June 24, 1975]

APPENDIX

[The following are some examples of specific records (or specific information relating to personnel, programs, or activities of this Department) listed according to whether or not they are available upon request for inspection and copying.]

Generally available	Generally not available
GRANTS	
Funded initial grant applications, subject to provisions of § 5.71. Reports of grantee Final report of any review or evaluation of grantee performance conducted or caused to be conducted by the Department. Application for demonstration, experimental, or pilot project under § 1115 of the Social Security Act. Applications for continuation, renewal, or supplemental grants, subject to provisions of § 5.71. State plan material	Research protocol, design, processing, and other technical information to the extent proprietary or of a confidential nature submitted with initial applications not yet funded, or where disclosure would adversely affect patent or other valuable rights. Confidential financial information of grantee. Site visit reports. Initial research or research training grant application on which award is not made. Summaries of recommendations of initial review groups ("pink sheets").
CONTRACTS	
Name of contractor, subject matter, date, and amount of contract.	Trade secrets.
Contract performance review report	Confidential pricing data contained in contract proposal if in the Department's judgment it is properly so designated by the offeror.
Deficiency report Report on performance of providers of medicare services.	Proprietary technical data contained in a contract proposal if in the Department's judgment it is properly so designated by offeror.
Final Report	Confidential financial information of contractor. Draft of proposed final report submitted for comment prior to acceptance. Research protocol, design, processing, and other technical information to the extent proprietary or of a confidential nature, including proprietary contents of unsolicited proposals. Proposals on which no award is made.
ADVISORY COMMITTEES	
Name of committee Final report Minutes or transcripts of meetings open to the public and not involved with matters exempt from mandatory disclosure under Freedom of Information Act.	Minutes or transcripts of committee meetings or portions thereof which are involved with matters exempt from mandatory disclosure under Freedom of Information Act.
PERSONNEL INFORMATION	
Name of employee, title of position, and location of regular duty station. Grade, position description, and salary of public employees.	Home addresses of employees.
AFFIRMATIVE ACTION PLAN FILED PURSUANT TO EXECUTIVE ORDER 11246	
Approved action plan, including analysis, proposed remedial or affirmative steps to be taken with goals and timetables, policies on recruitment, hiring, and promotion, and description of grievance procedures.	
MISCELLANEOUS	
	Names of individual beneficiaries of departmental programs or a list of the benefits they receive if release would be an unwarranted invasion of privacy. Earnings records, claims file, and other personal information maintained by or for the Social Security Administration. Office for Civil Rights investigatory files in open cases.

[38 FR 22233, Aug. 17, 1973, as amended at 40 FR 18998, May 1, 1975]

PART 5a—[RESERVED]

PART 5b—PRIVACY ACT REGULATIONS

Sec.
5b.1 Definitions.
5b.2 Purpose and scope.
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5b.4 Maintenance of records.
5b.5 Notification of or access to records.
5b.6 Special procedures for notification of or access to medical records.
5b.7 Procedures for correction or amendment of records.
5b.8 Appeals of refusals to correct or amend records.
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5b.10 Parents and guardians.
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Appendix A—Employee Standards of Conduct
Appendix B—Routine Uses Applicable to More Than One System of Records Maintained by HHS
Appendix C—Delegations of Authority [Reserved]

Authority: 5 U.S.C. 301, 5 U.S.C. 552a.

Source: 40 FR 47409, Oct. 8, 1975, unless otherwise noted.

§ 5b.1 Definitions.

As used in this part:

(a) "Access" means availability of a record to a subject individual.

(b) "Agency" means the Department of Health and Human Services.

(c) "Department" means the Department of Health and Human Services.

(d) "Disclosure" means the availability or release of a record to anyone other than the subject individual.

(e) "Individual" means a living person who is a citizen of the United States or an alien lawfully admitted or permanent residence. It does not nclude persons such as sole proprietorships, partnerships, or corporaions. A business firm which is identiied by the name of one or more perons is not an individual within the meaning of this Part.

(f) "Maintain" means to maintain, collect, use, or disseminate when used in connection with the term "record"; and, to have control over or responsibility for a system of records when used in connection with the term "system of records."

(g) "Notification" means communication to an individual whether he is a subject individual.

(h) "Record" means any item, collection, or grouping of information about an individual that is maintained by the Department, including but not limited to the individual's education, financial transactions, medical history, and criminal or employment history and that contains his name, or an identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. When used in this Part, record means only a record which is in a system of records.

(i) "Responsible Department official" means that officer who is listed in a notice of a system of records as the system manager for a given system of records or another individual listed in the notice of a system of records to whom requests may be made, or the designee of either such officer or individual.

(j) "Routine use" means the disclosure of a record outside the Department, without the consent of the subject individual, for a purpose which is compatible with the purpose for which the record was collected. It includes disclosures required to be made by statute other than the Freedom of Information Act, 5 U.S.C. 552. It does not include disclosures which are permitted to be made without the consent of the subject individual which are not compatible with the purpose for which it was collected such as disclosures to the Bureau of the Census, the General Accounting Office, or to Congress.

(k) "Secretary" means the Secretary of Health and Human Services, or his designee.

(l) "Statistical record" means a record maintained for statistical research or reporting purposes only and not maintained to make determinations about a particular subject individual.

(m) "Subject individual" means that individual to whom a record pertains.

(n) "System of records" means any group of records under the control of the Department from which a record is retrieved by personal identifier such as the name of the individual, number, symbol or other unique retriever assigned to the individual. Single records or groups of records which are not retrieved by a personal identifier are not part of a system of records. Papers maintained by individual employees of the Department which are prepared, maintained, or discarded at the discretion of the employee and which are not subject to the Federal Records Act, 44 U.S.C. 2901, are not part of a system of records; *Provided*, That such personal papers are not used by the employee or the Department to determine any rights, benefits, or privileges of individuals.

§ 5b.2 Purpose and scope.

(a) This Part implements section 3 of the Privacy Act of 1974, 5 U.S.C. 552a (hereinafter referred to as the Act), by establishing agency policies and procedures for the maintenance of records. This Part also establishes agency policies and procedures under which a subject individual may be given notification of or access to a record pertaining to him and policies and procedures under which a subject individual may have his record corrected or amended if he believes that his record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function.

(b) All components of the Department are governed by the provisions of this Part. Also governed by the provisions of this Part are:

(1) Certain non-federal entities which operate as agents of the Department for purposes of carrying out Federal functions, such as intermediaries and carriers performing functions under contracts and agreements entered into pursuant to sections 1816 and 1842 of the Social Security Act, 42 U.S.C. 1395h and 1395u.

(2) Advisory committees and councils within the meaning of the Federal Advisory Committee Act which provide advice to (i) any official or component of the Department or (ii) the President and for which the Department has been delegated responsibility for providing services.

(c) Employees of the Department governed by this Part include all regular and special government employees of the Department; members of the Public Health Service Commissioned Corps; experts and consultants whose temporary (not in excess of 1 year) or intermittent services have been procured by the Department by contract pursuant to 3109 of title 5, United States Code; volunteers where acceptance of their services are authorized by law; those individuals performing gratuitous services as permitted under conditions prescribed by the Civil Service Commission; and, participants in work-study or training programs.

(d) Where other statutes mandate procedures which are inconsistent with the procedures set forth in this Part, components of the Department may issue supplementary regulations containing procedures necessary to comply with such statutes. In addition, components of the Department may supplement by regulation the policies and procedures set forth in this Part to meet particular needs of the programs administered by such components.

(e) This Part does not:

(1) Make available to a subject individual records which are not retrieved by that individual's name or other personal identifier.

(2) Make available to the general public records which are retrieved by a subject individual's name or other personal identifier or make available to the general public records which

would otherwise not be available to the general public under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

(3) Govern the maintenance or disclosure of, notification of or access to, records in the possession of the Department which are subject to regulations of another agency, such as personnel records subject to the regulations of the Civil Service Commission.

(4) Apply to grantees, including State and local governments or subdivisions thereof, administering federally funded programs.

(5) Make available records compiled by the Department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such records to the general public or to any subject individual or party to such litigation or proceedings shall be governed by applicable constitutional principles, rules of discovery, and applicable regulations of the Department and any of its components.

§ 5b.3 Policy.

It is the policy of the Department to protect the privacy of individuals to the fullest extent possible while nonetheless permitting the exchange of records required to fulfill the administrative and program responsibilities of the Department, and responsibilities of the Department for disclosing records which the general public is entitled to have under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

§ 5b.4 Maintenance of records.

(a) No record will be maintained by the Department unless:

(1) It is relevant and necessary to accomplish a Department function required to be accomplished by statute or Executive Order;

(2) It is acquired to the greatest extent practicable from the subject individual when maintenance of the record may result in a determination about the subject individual's rights, benefits or privileges under Federal programs;

(3) The individual providing the record is informed of the authority for providing the record (including whether the providing of the record is mandatory or voluntary, the principal purpose for maintaining the record, the routine uses for the record, what effect his refusal to provide the record may have on him), and if the record is not required by statute or Executive Order to be provided by the individual, he agrees to provide the record.

(b) No record will be maintained by the Department which describes how an individual exercises rights guaranteed by the First Amendment unless expressly authorized (1) by statute, or (2) by the subject individual, or (3) unless pertinent to and within the scope of an authorized law enforcement activity.

§ 5b.5 Notification of or access to records.

(a) *Times, places, and manner of requesting notification of or access to a record.* (1) Subject to the provisions governing medical records in § 5b.6 of this part, any individual may request notification of a record. He may at the same time request access to any record pertaining to him. An individual may be accompanied by another individual of his choice when he requests access to a record in person; *Provided,* That he affirmatively authorizes the presence of such other individual during any discussion of a record to which access is requested.

(2) An individual making a request for notification of or access to a record shall address his request to the responsible Department official and shall verify his identity when required in accordance with paragraph (b)(2) of this section. At the time the request is made, the individual shall specify which systems of records he wishes to have searched and the records to which he wishes to have access. He may also request that copies be made of all or any such records. An individual shall also provide the responsible Department official with sufficient particulars to enable such official to distinguish between records on subject individuals with the same name. The necessary particulars are set forth in the notices of systems of records.

(3) An individual who makes a request in person may leave with any responsible Department official a request for notification of or access to a

record under the control of another responsible Department official; *Provided*, That the request is addressed in writing to the appropriate responsible Department official.

(b) *Verification of identity*—(1) *When required.* Unless an individual, who is making a request for notification of or access to a record in person, is personally known to the responsible Department official, he shall be required to verify his identity in accordance with paragraph (b)(2) of this section if:

(i) He makes a request for notification of a record and the responsible Department official determines that the mere disclosure of the existence of the record would be a clearly unwarranted invasion of privacy if disclosed to someone other than the subject individual; or,

(ii) He makes a request for access to a record which is not required to be disclosed to the general public under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

(2) *Manner of verifying identity.*

(i) An individual who makes a request in person shall provide to the responsible Department official at least one piece of tangible identification such as a driver's license, passport, alien or voter registration card, or union card to verify his identity. If an individual does not have identification papers to verify his identity, he shall certify in writing that he is the individual who he claims to be and that he understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Act subject to a $5,000 fine.

(ii) Except as provided in paragraph (b)(2)(v) of this section, an individual who does not make a request in person shall submit a notarized request to the responsible Department official to verify his identity or shall certify in his request that he is the individual who he claims to be and that he understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Act subject to a $5,000 fine.

(iii) An individual who makes a request on behalf of a minor or legal incompetent as authorized under § 5b.10 of this Part shall verify his relationship to the minor or legal incompetent, in addition to verifying his own identity, by providing a copy of the minor's birth certificate, a court order, or other competent evidence of guardianship to the responsible Department official; *except that*, an individual is not required to verify his relationship to the minor or legal incompetent when he is not required to verify his own identity or when evidence of his relationship to the minor or legal incompetent has been previously given to the responsible Department official.

(iv) An individual shall further verify his identity if he is requesting notification of or access to sensitive records such as medical records. Any further verification shall parallel the record to which notification or access is being sought. Such further verification may include such particulars as the individual's years of attendance at a particular educational institution, rank attained in the uniformed services, date or place of birth, names of parents, an occupation or the specific times the individual received medical treatment.

(v) An individual who makes a request by telephone shall verify his identity by providing to the responsible Department official identifying particulars which parallel the record to which notification or access is being sought. If the responsible Department official determines that the particulars provided by telephone are insufficient, the requester will be required to submit the request in writing or in person. Telephone requests will not be accepted where an individual is requesting notification of or access to sensitive records such as medical records.

(c) *Granting notification of or access to a record.* (1) Subject to the provisions governing medical records in § 5b.6 of this part and the provisions governing exempt systems in § 5b.11 of this part, a responsible Department official, who receives a request for notification of or access to a record and, if required, verification of an individual's identity, will review the request and grant notification or access to a record, if the individual requesting access to the record is the subject individual.

(2) If the responsible Department official determines that there will be a delay in responding to a request because of the number of requests being processed, a breakdown of equipment, shortage of personnel, storage of records in other locations, etc., he will so inform the individual and indicate when notification or access will be granted.

(3) Prior to granting notification of or access to a record, the responsible Department official may at his discretion require an individual making a request in person to reduce his request to writing if the individual has not already done so at the time the request is made.

§ 5b.6 Special procedures for notification of or access to medical records.

(a) *General.* An individual in general has a right to notification of or access to his medical records, including psychological records, as well as to other records pertaining to him maintained by the Department. This section sets forth special procedures as permitted by the Act for notification of or access to medical records, including a special procedure for notification of or access to medical records of minors. The special procedures set forth in paragraph (b) of this section may not be suitable for use by every component of the Department. Therefore, components may follow the paragraph (b) procedure for notification of or access to medical records, or may issue regulations establishing special procedures for such purposes. The special procedure set forth in paragraph (c) of this section relating to medical records of minors is mandatory.

(b) *Medical records procedures*—(1) *Notification of or access to medical records.* (i) Any individual may request notification of or access to a medical record pertaining to him. Unless the individual is a parent or guardian requesting notification of or access to a minor's medical record, an individual shall make a request for a medical record in accordance with this section and the procedures in § 5b.5 of this Part.

(ii) An individual who requests notification of or access to a medical record shall, at the time the request is made, designate a representative in writing. The representative may be a physician, other health professional, or other responsible individual, who would be willing to review the record and inform the subject individual of its contents at the representative's discretion.

(2) *Utilization of the designated representative.* A subject individual will be granted direct access to a medical record if the responsible official determines that direct access is not likely to have an adverse effect on the subject individual. If the responsible Department official believes that he is not qualified to determine, or if he does determine, that direct access to the subject individual is likely to have an adverse effect on the subject individual, the record will be sent to the designated representative. The subject individual will be informed in writing that the record has been sent.

(c) *Medical records of minors*—(1) *Requests by minors; notification of or access to medical records to minors.* A minor may request notification of or access to a medical record pertaining to him in accordance with paragraph (b) of this section.

(2) *Requests on a minor's behalf; notification of or access to medical records to an individual on a minor's behalf.* (i) In order to protect the privacy of a minor, a parent or guardian, authorized to act on a minor's behalf as provided in § 5b.10 of this part, who makes a request for notification of or access to a minor's medical record will not be given direct notification of or access to such record.

(ii) A parent or guardian shall make all requests for notification of or access to a minor's medical record in accordance with this paragraph and the procedures in § 5b.5 of this part. A parent or guardian shall at the time he makes a request designate a family physician or other health professional (other than a family member) to whom the record, if any, will be sent.

(iii) Where a medical record on the minor exists, it will be sent to the physician or health professional designated by the parent or guardian in all cases. If disclosure of the record would constitute an invasion of the minor's privacy, that fact will be brought to the attention of the physician or health professional to whom the record is sent. The physician or health professional will be asked to consider the effect that disclosure of the record to the parent or guardian would have on the minor in determining whether the minor's medical record should be made available to the parent or guardian. Response to the parent or guardian making the request will be made in substantially the following form:

> We have completed processing your request for notification of or access to ——— —————————————————'s
> (Name of minor)
> medical records. Please be informed that if any medical record were found pertaining to that individual, they have not been sent to your designated physician or health professional.

In each case where a minor's medical record is sent to a physician or health professional, reasonable efforts will be made to so inform the minor.

§ 5b.7 Procedures for correction or amendment of records.

(a) Any subject individual may request that his record be corrected or amended if he believes that the record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function. A subject individual making a request to amend or correct his record shall address his request to the responsible Department official in writing; *except that,* the request need not be in writing if the subject individual makes his request in person and the responsible Department official corrects or amends the record at that time. The subject individual shall specify in each request:

(1) The system of records from which the record is retrieved;

(2) The particular record which he is seeking to correct or amend;

(3) Whether he is seeking an addition to or a deletion or substitution of the record; and,

(4) His reasons for requesting correction or amendment of the record.

(b) A request for correction or amendment of a record will be acknowledged within 10 working days of its receipt unless the request can be processed and the subject individual informed of the responsible Department official's decision on the request within that 10 day period.

(c) If the responsible Department official agrees that the record is not accurate, timely, or complete based on a preponderance of the evidence, the record will be corrected or amended. The record will be deleted without regard to its accuracy, if the record is not relevant or necessary to accomplish the Department function for which the record was provided or is maintained. In either case, the subject individual will be informed in writing of the correction, amendment, or deletion and, if accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(d) If the responsible Department official does not agree that the record should be corrected or amended, the subject individual will be informed in writing of the refusal to correct or amend the record. He will also be informed that he may appeal the refusal to correct or amend his record to the appropriate appeal authority listed in § 5b.8 of this Part. The appropriate appeal authority will be identified to the subject individual by name, title, and business address.

(e) Requests to correct or amend a record governed by the regulation of another government agency, *e.g.,* Civil Service Commission, Federal Bureau of Investigation, will be forwarded to such government agency for processing and the subject individual will be informed in writing of the referral.

§ 5b.8 Appeals of refusals to correct or amend records.

(a) *Processing the appeal.* (1) A subject individual who disagrees with a refusal to correct or amend his record may appeal the refusal in writing. All appeals shall be made to the following appeal authorities, or their designees, or successors in function:

(i) Assistant Secretary for Administration and Management for records of the Office of the Secretary, or where the initial refusal to correct or amend was made by another appeal authority. The appeal authority for an initial refusal by the Assistant Secretary for Administration and Management is the Under Secretary.

(ii) Assistant Secretary for Health for records of the Public Health Service including Office of Assistant Secretary for Health; Health Resources Administration; Health Services Administration; Alcohol, Drug Abuse, and Mental Health Administration; Center for Disease Control; National Institutes of Health; and Food and Drug Administration.

(iii) Assistant Secretary for Education for records of the Office of the Assistant Secretary for Education, National Center for Education Statistics, National Institute of Education, and Office of Education.

(iv) Assistant Secretary for Human Development for records of the Office of Human Development.

(v) Commissioner of Social Security for records of the Social Security Administration.

(vi) Administrator, Social and Rehabilitation Service for the records of the Social and Rehabilitation Service.

(2) An appeal will be completed within 30 working days from its receipt by the appeal authority; *except that*, the appeal authority may for good cause extend this period for an additional 30 days. Should the appeal period be extended, the subject individual appealing the refusal to correct or amend the record will be informed in writing of the extension and the circumstances of the delay. The subject individual's request to amend or correct the record, the responsible Department official's refusal to correct or amend, and any other pertinent material relating to the appeal will be reviewed. No hearing will be held.

(3) If the appeal authority agrees that the record subject to the appeal should be corrected or amended, the record will be amended and the subject individual will be informed in writing of the correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(4) If the appeal is denied, the subject individual will be informed in writing:

(i) Of the denial and the reasons for the denial;

(ii) That he has a right to seek judicial review of the denial; and,

(iii) That he may submit to the responsible Department official a concise statement of disagreement to be associated with the disputed record and disclosed whenever the record is disclosed.

(b) *Notation and disclosure of disputed records.* Whenever a subject individual submits a statement of disagreement to the responsible Department official in accordance with paragraph (a)(4)(iii) of this section, the record will be noted to indicate that it is disputed. In any subsequent disclosure, a copy of the subject individual's statement of disagreement, will be disclosed with the record. If the responsible Department official deems it appropriate, a concise statement of the appeal authority's reasons for denying the subject individual's appeal may also be disclosed with the record. While the subject individual will have access to this statement of reasons, such statement will not be subject to correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be provided a copy of the subject individual's statement of disagreement, as well as the statement, if any, of the appeal authority's reasons for denying the subject individual's appeal.

§ 5b.9 Disclosure of records.

(a) *Consent to disclosure by a subject individual.* (1) Except as provided in paragraph (b) of this section authorizing disclosures of records without consent, no disclosure of a record will be made without the consent of the subject individual. In each case the consent, whether obtained from the subject individual at the request of the Department or whether provided to the Department by the subject individual on his own initiative, shall be in writing. The consent shall specify the individual, organizational unit or class of individuals or organizational units to whom the record may be disclosed, which record may be disclosed and, where applicable, during which time frame the record may be disclosed (*e.g.*, during the school year, while the subject individual is out of the country, whenever the subject individual is receiving specific services). A blanket consent to disclose all of a subject individual's records to unspecified individuals or organizational units will not be honored. The subject individual's identity and, where applicable (*e.g.*, where a subject individual gives consent to disclosure of a record to a specific individual), the identity of the individual to whom the record is to be disclosed shall be verified.

(2) A parent or guardian of any minor is not authorized to give consent to a disclosure of the minor's medical record.

(b) *Disclosures without the consent of the subject individual.* The disclosures listed in this paragraph may be made without the consent of the subject individual. Such disclosures are:

(1) To those officers and employees of the Department who have a need for the record in the performance of their duties. The responsible Department official may upon request of any officer or employee, or on his own initiative, determine what constitutes legitimate need.

(2) Required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

(3) For a routine use as defined in paragraph (j) of § 5b.1 of this Part. Routine uses will be listed in any notice of a system of records. Routine uses published in Appendix B are applicable to more than one system of records. Where applicable, notices of systems of records may contain references to the routine uses listed in Appendix B. Appendix B will be published with any compendium of notices of systems of records.

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 U.S.C.

(5) To a recipient who has provided the agency with advance written assurance that the record will be used solely as a statistical research or reporting record; *Provided*, That, the record is transferred in a form that does not identify the subject individual.

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value.

(7) To another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of such government agency or instrumentality has submitted a written request to the Department specifying the record desired and the law enforcement activity for which the record is sought.

(8) To an individual pursuant to a showing of compelling circumstances affecting the health or safety of any individual if a notice of the disclosure is transmitted to the last known address of the subject individual.

(9) To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.

(10) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office.

(11) Pursuant to the order of a court of competent jurisdiction.

(c) *Accounting of disclosures.* (1) An accounting of all disclosures of a record will be made and maintained by the Department for 5 years or for the life of the record, whichever is longer; *except that,* such an accounting will not be made:

(i) For disclosures under paragraph (b)(1) and (2) of this section; and,

(ii) For disclosures made with the written consent of the subject individual.

(2) The accounting will include:

(i) The date, nature, and purpose of each disclosure; and

(ii) The name and address of the person or entity to whom the disclosure is made.

(3) Any subject individual may request access to an accounting of disclosures of a record. The subject individual shall make a request for access to an accounting in accordance with the procedures in § 5b.5 of this part. A subject individual will be granted access to an accounting of the disclosures of a record in accordance with the procedures of this part which govern access to the related record. Access to an accounting of a disclosure of a record made under paragraph (b)(7) of this section may be granted at the discretion of the responsible Department official.

§ 5b.10 Parents and guardians.

For the purpose of this part, a parent or guardian of any minor or the legal guardian or any individual who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction is authorized to act on behalf of an individual or a subject individual. Except as provided in paragraph (b)(2) of § 5b.5, of this Part governing procedures for verifying an individual's identity, and paragraph (c) (2) of § 5b.6 of this part governing special procedures for notification of or access to a minor's medical records, an individual authorized to act on behalf of a minor or legal incompetent will be viewed as if he were the individual or subject individual.

§ 5b.11 Exempt systems.

(a) *General policy.* The Act permits certain types of specific systems of records to be exempt from some of its requirements. It is the policy of the Department to exercise authority to exempt systems of records only in compelling cases.

(b) *Specific systems of records exempted.* (1) Those systems of records listed in paragraph (b)(2) of this section are exempt from the following provisions of the Act and this Part:

(i) 5 U.S.C. 552a(c)(3) and paragraph (c)(2) of § 5b.9 of this part which require a subject individual to be granted access to an accounting of disclosures of a record.

(ii) 5 U.S.C. 552a(d) (1) through (4) and (f) and §§ 5b.6, 5b.7, and 5b.8 of this part relating to notification of or access to records and correction or amendment of records.

(iii) 5 U.S.C. 552a(e)(4) (G) and (H) which require inclusion of information about Department procedures for notification, access, and correction or amendment of records in the notice for the systems of records.

(iv) 5 U.S.C. 552(e)(3) and paragraph (a)(3) of § 5b.4 of this Part which require that an individual asked to provide a record to the Department be informed of the authority for providing the record (including whether the providing of the record is mandatory or voluntary, the principal purposes for maintaining the record, the routine uses for the record, and what effect his refusal to provide the record may have on him), and if the record is not required by statute or Executive Order to be provided by the individual, he agrees to provide the record. This exemption applies only to an investigatory record compiled by the Department for criminal law enforcement purposes in a system of records exempt under subsection (j)(2) of the Act to the extent that these requirements would prejudice the conduct of the investigation.

(2) The following systems of records are exempt from those provisions of the Act and this part listed in paragraph (b) (1) of this section.

(i) Pursuant to subsection (j)(2) of the Act:

(A) The Saint Elizabeths Hospital's Court-Ordered Forensic Investigatory Materials Files; and

(B) The Investigatory Material Compiled for Law Enforcement Purposes System, HHS.

(ii) Pursuant to subsection (k)(2) of the Act:

(A) The General Criminal Investigation Files, HHS/SSA;

(B) The Criminal Investigations File, HHS/SSA; and,

(C) The Program Integrity Case Files, HHS/SSA.

(iii) Pursuant to subsection (k)(4) of the Act:

(A) The Health and Demographic Surveys Conduct in Random Samples of the U.S. Population;

(B) The Health Manpower Inventories and Surveys;

(C) The Vital Statistics for Births, Deaths, Fetal Deaths, Marriages and Divorces Occurring in the U.S. during Each Year; and,

(D) The Maryland Psychiatric Case Register.

(E) The Health Resources Utilization Statistics, DHHS/OASH/NCHS.

(iv) Pursuant to subsection (k)(5) of the Act:

(A) The Investigatory Material Compiled for Security and Suitability Purposes System, HHS; and,

(B) The Suitability for Employment Records, HHS.

(v) Pursuant to subsections (j)(2), (k)(2), and (k)(5) of the Act:

(A) The Clinical Investigatory Records, HHS/FDA;

(B) The Regulated Industry Employee Enforcement Records, HHS/FDA;

(C) The Employee Conduct Investigative Records, HHS/FDA; and,

(D) The Service Contractor Employee Investigative Records, HHS/FDA.

(vi) Pursuant to subsection (k)(6) of the Act:

(A) The Personnel Research and Merit Promotion Test Records, HHS/SSA/OMA.

(c) *Notification of or access to records in exempt systems of records.* (1) Where a system of records is exempt as provided in paragraph (b) of this section, any individual may nonetheless request notification of or access to a record in that system. An individual shall make requests for notification of or access to a record in an exempt system of records in accordance with the procedures of §§ 5b.5 and 5b.6 of this part.

(2) An individual will be granted notification of or access to a record in an exempt system but only to the extent such notification or access would not reveal the identity of a source who furnished the record to the Department under an express promise, and prior to September 27, 1975 an implied promise, that his identity would be held in confidence, if:

(i) The record is in a system of records which is exempt under subsection (k)(2) of the Act and the individual has been, as a result of the maintenance of the record, denied a right, privilege, or benefit to which he would otherwise be eligible; or,

(ii) The record is in a system of records which is exempt under subsection (k)(5) of the Act.

(3) If an individual is not granted notification of or access to a record in a system of records exempt under subsections (k) (2) and (5) of the Act in accordance with this paragraph, he will be informed that the identity of a confidential source would be revealed if notification of or access to the record were granted to him.

(d) *Discretionary actions by the responsible Department official.* Unless disclosure of a record to the general public is otherwise prohibited by law, the responsible Department official may in his discretion grant notification of or access to a record in a system of records which is exempt under paragraph (b) of this section. Discretionary notification of or access to a record in accordance with this paragraph will not be a precedent for discretionary notification of or access to a similar or related record and will not obligate the responsible Department official to exercise his discretion to grant notification of or access to any other record in a system of records which is exempt under paragraph (b) of this section.

[40 FR 47409, Oct. 8, 1975, as amended at 43 FR 40229, Sept. 11, 1978]

§ 5b.12 Contractors.

(a) All contracts entered into on or after September 27, 1975 which require a contractor to maintain or on behalf of the Department to maintain, a system of records to accomplish a Department function must contain a provision requiring the contractor to comply with the Act and this part.

(b) All unexpired contracts entered into prior to September 27, 1975 which require the contractor to maintain or on behalf of the Department to maintain, a system of records to accomplish a Department function will be amended as soon as practicable to include a provision requiring the contractor to comply with the Act and this Part. All such contracts must be so amended by July 1, 1976 unless for good cause the appeal authority identified in § 5b.8 of this part authorizes the continuation of the contract without amendment beyond that date.

(c) A contractor and any employee of such contractor shall be considered employees of the Department only for the purposes of the criminal penalties of the Act, 5 U.S.C. 552a(i), and the employee standards of conduct listed in Appendix A of this part where the contract contains a provision requiring the contractor to comply with the Act and this part.

(d) This section does not apply to systems of records maintained by a contractor as a result of his management discretion, *e.g.*, the contractor's personnel records.

§ 5b.13 Fees.

(a) *Policy.* Where applicable, fees for copying records will be charged in accordance with the schedule set forth in this section. Fees may only be charged where an individual requests that a copy be made of the record to which he is granted access. No fee may be charged for making a search of the system of records whether the search is manual, mechanical, or electronic. Where a copy of the record must be made in order to provide access to the record (*e.g.*, computer printout where no screen reading is available), the copy will be made available to the individual without cost. Where a medical record is made available to a representative designated by the individual or to a physician or health professional designated by a parent or guardian under § 5b.6 of this Part, no fee will be charged.

(b) *Fee schedule.* The fee schedule for the Department is as follows:

(1) Copying of records susceptible to photocopying—$.10 per page.

(2) Copying records not susceptible to photocopying (*e.g.*, punch cards or magnetic tapes)—at actual cost to be determined on a case-by-case basis.

(3) No charge will be made if the total amount of copying does not exceed $25.

APPENDIX A—EMPLOYEE STANDARDS OF CONDUCT

(a) *General.* All employees are required to be aware of their responsibilities under the Privacy Act of 1974, 5 U.S.C. 552a. Regulations implementing the Act are set forth in 45 CFR 5b. Instruction on the requirements of the Act and regulation shall be provided to all new employees of the Department. In addition, supervisors shall be responsible for assuring that employees who are working with systems of records or who undertake new duties which require the use of systems of records are informed of their responsibilities. Supervisors shall also be responsible for assuring that all employees who work with such systems of records are periodically reminded of the requirements of the Act and are advised of any new provisions or interpretations of the Act.

(b) *Penalties.* (1) All employees must guard against improper disclosure of records which are governed by the Act. Because of the serious consequences of improper invasions of personal privacy, employees may be subject to disciplinary action and criminal prosecution for knowing and willful violations of the Act and regulation. In addition, employees may also be subject to disciplinary action for unknowing or unwillful violations, where the employee had notice of the provisions of the Act and regulations and failed to inform himself sufficiently or to conduct himself in accordance with the requirements to avoid violations.

(2) The Department may be subjected to civil liability for the following actions undertaken by its employees:

(a) Making a determination under the Act and section 5b.7 and 5b.8 of the regulation not to amend an individual's record in accordance with his request, or failing to make such review in conformity with those provisions;

(b) Refusing to comply with an individual's request for notification of or access to a record pertaining to him;

(c) Failing to maintain any record pertaining to any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such a record, and consequently a determination is made which is adverse to the individual; or

(d) Failing to comply with any other provision of the Act or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

(3) "An employee may be personally subject to criminal liability as set forth below and in 5 U.S.C. 552a (i):

(a) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by the Act or by rules or regulations established thereunder, and who, knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000."

(b) "Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements [of the Act] shall be guilty of a misdemeanor and fined not more than $5,000."

(c) *Rules Governing Employees Not Working With Systems of Records.* Employees whose duties do not involve working with systems of records will not generally disclose to any one, without specific authorization from their supervisors, records pertaining to employees or other individuals which by reason of their official duties are available to them. Notwithstanding the above, the following records concerning Federal employees are a matter of public record and no further authorization is necessary for disclosure:

(1) Name and title of individual.

(2) Grade classification or equivalent and annual rate of salary.

(3) Position description.

(4) Location of duty station, including room number and telephone number.

In addition, employees shall disclose records which are listed in the Department's Freedom of Information Regulation as being available to the public. Requests for other records will be referred to the responsible Department official. This does not preclude employees from discussing matters which are known to them personally, and without resort to a record, to official investigators of Federal agencies for official purposes such as suitability checks, Equal Employment Opportunity investigations, adverse action proceedings, grievance proceedings, etc.

(d) *Rules governing employees whose duties require use or reference to systems of records.* Employees whose official duties require that they refer to, maintain, service, or otherwise deal with systems of records (hereinafter referred to as "Systems Employees") are governed by the general provisions. In addition, extra precautions are required and systems employees are held to higher standards of conduct.

(1) Systems Employees shall:

(a) Be informed with respect to their responsibilities under the Act;

(b) Be alert to possible misuses of the system and report to their supervisors any potential or actual use of the system which they believe is not in compliance with the Act and regulation;

(c) Make a disclosure of records within the Department only to an employee who has a legitimate need to know the record in the course of his official duties;

(d) Maintain records as accurately as practicable.

(e) Consult with a supervisor prior to taking any action where they are in doubt whether such action is in conformance with the Act and regulation.

(2) Systems Employees shall not:

(a) Disclose in any form records from a system of records except (1) with the consent or at the request of the subject individual; or (2) where its disclosure is permitted under § 5b.9 of the regulation.

(b) Permit unauthorized individuals to be present in controlled areas. Any unauthorized individuals observed in controlled areas shall be reported to a supervisor or to the guard force.

(c) Knowingly or willfully take action which might subject the Department to civil liability.

(d) Make any arrangements for the design development, or operation of any system of records without making reasonable effort to provide that the system can be maintained in accordance with the Act and regulation.

(e) *Contracting officers.* In addition to any applicable provisions set forth above, those employees whose official duties involve entering into contracts on behalf of the Department shall also be governed by the following provisions:

(1) *Contracts for design, or development of systems and equipment.* No contract for the design or development of a system of records, or for equipment to store, service or maintain a system of records shall be entered into unless the contracting officer has made reasonable effort to ensure that the product to be purchased is capable of being used without violation of the Act or regulation. Special attention shall be given to provision of physical safeguards.

(2) *Contracts for the operation of systems and equipment.* No contract for the design or development of a system of whom he feels appropriate, of all proposed contracts providing for the operation of systems of records shall be made prior to execution of the contracts to determine whether operation of the system of records is for the purpose of accomplishing a Department function. If a determination is made that the operation of the system is to accomplish a Department function, the contracting officer shall be responsible for including in the con-

tract appropriate provisions to apply the provisions of the Act and regulation to the system, including prohibitions against improper release by the contractor, his employees, agents, or subcontractors.

(3) *Other service contracts.* Contracting officers entering into general service contracts shall be responsible for determining the appropriateness of including provisions in the contract to prevent potential misuse (inadvertent or otherwise) by employees, agents, or subcontractors of the contractor.

(f) *Rules Governing Responsible Department Officials.* In addition to the requirements for Systems Employees, responsible Department officials shall:

(1) respond to all requests for notification of or access, disclosure, or amendment of records in a timely fashion in accordance with the Act and regulation;

(2) make any amendment of records accurately and in a timely fashion;

(3) inform all persons whom the accounting records show have received copies of the record prior to the amendments of the correction; and

(4) associate any statement of disagreement with the disputed record, and

(a) transmit a copy of the statement to all persons whom the accounting records show have received a copy of the disputed record, and

(b) transmit that statement with any future disclosure.

APPENDIX B—ROUTINE USES APPLICABLE TO MORE THAN ONE SYSTEM OF RECORDS MAINTAINED BY HHS

(1) In the event that a system of records maintained by this agency or carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether federal, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

(2) Referrals may be made of assignments of research investigators and project monitors to specific research projects to the Smithsonian Institution to contribute to the Smithsonian Science Information Exchange, Inc.

(3) In the event the Department deems it desirable or necessary, in determining whether particular records are required to be disclosed under the Freedom of Information Act, disclosure may be made to the Department of Justice for the purpose of obtaining its advice.

(4) A record from this system of records may be disclosed as a "routine use" to a federal, state or local agency maintaining civil, criminal or other relevant enforcement records or other pertinent records, such as current licenses, if necessary to obtain a record relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

A record from this system of records may be disclosed to a federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the record is relevant and necessary to the requesting agency's decision on the matter.

(5) In the event that a system of records maintained by this agency to carry out its function indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether state or local charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

(6) Where federal agencies having the power to subpoena other federal agencies' records, such as the Internal Revenue Service or the Civil Rights Commission, issue a subpoena to the Department for records in this system of records, the Department will make such records available.

(7) Where a contract between a component of the Department and a labor organization recognized under E.O. 11491 provides that the agency will disclose personal records relevant to the organization's mission, records in this system of records may be disclosed to such organization.

(8) Where the appropriate official of the Department, pursuant to the Department's Freedom of Information Regulation determines that it is in the public interest to disclose a record which is otherwise exempt from mandatory disclosure, disclosure may be made from this system of records.

(9) The Department contemplates that it will contract with a private firm for the purpose of collating, analyzing, aggregating or otherwise refining records in this system. Relevant records will be disclosed to such a contractor. The contractor shall be required

to maintain Privacy Act safeguards with respect to such records.

(10)-(99) [Reserved]

(100) To the Department of Justice or other appropriate Federal agencies in defending claims against the United States when the claim is based upon an individual's mental or physical condition and is alleged to have arisen because of activities of the Public Health Service in connection with such individual.

(101) To individuals and organizations, deemed qualified by the Secretary to carry out specific research solely for the purpose of carrying out such research.

(102) To organizations deemed qualified by the Secretary to carry out quality assessment, medical audits or utilization review.

(103) Disclosures in the course of employee discipline or competence determination proceedings.

APPENDIX C—DELEGATIONS OF AUTHORITY [RESERVED]

PART 6—INVENTIONS AND PATENTS (GENERAL)

Sec.
6.0 General policy.
6.1 Publication or patenting of inventions.
6.2 General Responsibility.
6.3 Licensing of Government-owned patents.
6.4 Central records; confidentiality.

AUTHORITY: Reorg. Plan No. 1 of 1953, 18 FR 2053; 3 CFR, 1953 Supp. E.O. 10096, 15 FR 391; 3 CFR, 1950 Supp.

§ 6.0 General policy.

Inventions developed through the resources and activities of the Department are a potential resource of great value to the public health and welfare. It is the policy of the Department:

(a) To safeguard the public interest in inventions developed by Department employees, contractors and grantees with the aid of public funds and facilities;

(b) To encourage and recognize individual and cooperative achievement in research and investigations; and

(c) To establish a procedure, consistent with pertinent statutes, Executive orders and general Government regulations, for the determination of rights and obligations relating to the patenting of inventions.

[20 FR 6747, Sept. 14, 1965. Redesignated at 31 FR 12842, Oct. 1, 1966]

§ 6.1 Publication or patenting of inventions.

It is the general policy of the Department that the results of Department research should be made widely, promptly and freely available to other research workers and to the public. This availability can generally be adequately preserved by the dedication of a Government-owned invention to the public. Determinations to file a domestic patent application on inventions in which the Department has an interest will be made where the circumstances indicate that this is desirable in the public interest, and if it is practicable to do so. Department determinations not to apply for a domestic patent on employee inventions are subject to review and approval by the Commissioner of Patents. Except where deemed necessary for protecting the patent claim, the fact that a patent application has been or may be filed will not require any departure from normal policy regarding the dissemination of the results of Department research.

[28 FR 2990, Mar. 27, 1963. Redesignated at 31 FR 12842, Oct. 1, 1966]

§ 6.2 General Responsibility.

The Assistant Secretary (Health and Scientific Affairs) is responsible for the administration of the invention and patent program of the Department and the determination of rights in inventions and patents in which the Department has an interest.

[31 FR 12842, Oct. 1, 1966]

§ 6.3 Licensing of Government-owned patents.

(a) Licenses to practice inventions covered by patents and pending patent applications owned by the U.S. Government as represented by this Department will generally be royalty free, revocable and nonexclusive. They will normally be issued to all applicants and will generally contain no limitations or standards relating to the quality or testing of the products to be manufactured, sold, or distributed thereunder.

(b) Where it appears however that the public interest will be served under the circumstances of the particular case by licenses which impose conditions, such as those relating to quality or testing of products, requirement of payment of royalties to the Government, etc., or by the issuance of limited exclusive licenses by the Assistant Secretary for Health and Scientific Affairs after notice and opportunity for hearing thereon, such licenses may be issued.

[34 FR 15560, Oct. 7, 1969]

§ 6.4 Central records; confidentiality.

Central files and records shall be maintained of all inventions, patents, and licenses in which the Department has an interest, together with a record of all licenses issued by the Department under such patents. Invention reports required from employees or others for the purpose of obtaining determinations of ownership, and documents and information obtained for the purpose of prosecuting patent applications shall be confidential and shall be disclosed only as required for official purposes or with the consent of the inventor.

[20 FR 6747, Sept. 14, 1965]

PART 7—EMPLOYEE INVENTIONS

Sec.
7.0 Who are employees.
7.1 Duty of employee to report inventions.
7.3 Determination as to domestic rights.
7.4 Option to acquire foreign rights.
7.7 Notice to employee of determination.
7.8 Employee's right of appeal.

Authority: Reorg. Plan No. 1 of 1953, 18 FR 2053; 3 CFR 1953 Supp. E.O. 10096, 15 FR 391; 3 CFR. 1950 Supp. and E.O. 10930, 26 FR 2583; 3 CFR 1961 Supp.

Source: 27 FR 7986, Aug. 10, 1962, unless otherwise noted.

§ 7.0 Who are employees.

As used in this part, the term "Government employee" means any officer or employee, civilian or military, except such part-time employees or part-time consultants as may be excluded therefrom by a determination made in writing by the head of the employee's office or constituent organization, pursuant to an exemption approved by the Commissioner of Patents that to include him or them would be impracticable or inequitable, given the reasons therefor. A person shall not be considered to be a part-time employee or part-time consultant for this purpose unless the terms of his employment contemplate that he shall work for less than the minimum number of hours per day, or less than a minimum number of days per week, or less than the minimum number of weeks per year, regularly required of full-time employees of his class.

§ 7.1 Duty of employee to report inventions.

Every Department employee is required to report to the Assistant Secretary (Health and Scientific Affairs) in accordance with the procedures established therefor, every invention made by him (whether or not jointly with others) which bears any relation to his official duties or which was made in whole or in any part during working hours, or with any contribution of Government facilities, equipment, material, funds, or information, or of time or services of other Government employees on official duty.

[31 FR 12842, Oct. 1, 1966]

§ 7.3 Determination as to domestic rights.

The determination of the ownership of the domestic right, title, and interest in and to an invention which is or may be patentable, made by a Government employee while under the administrative jurisdiction of the Department, shall be made in writing by the Assistant Secretary (Health and Scientific Affairs), in accordance with the provisions of Executive Order 10096 and Government-wide regulations issued thereunder by the Commissioner of Patents as follows:

(a) The Government as represented by the Assistant Secretary (Health and Scientific Affairs) shall obtain the entire domestic right, title and interest in and to all inventions made by any Government employee (1) during working hours, or (2) with a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or (3) which bear a direct relation to or are made in consequence of the official duties of the inventor.

(b) In any case where the contribution of the Government, as measured by any one or more of the criteria set forth in paragraph (a) of this section, to the invention is insufficient equitably to justify a requirement of assignment to the Government of the entire domestic right, title and interest in and to such invention, or in any case where the Government has insufficient interest in an invention to obtain the entire domestic right, title, and interest therein (although the Government could obtain same under paragraph (a) of this section), the Department, subject to the approval of the Commissioner, shall leave title to such invention in the employee, subject, however, to the reservation to the Government of a nonexclusive, irrevocable, royalty-free license in the invention with power to grant licenses for all governmental purposes, such reservation to appear, where practicable, in any patent, domestic or foreign, which may issue on such invention.

(c) In applying the provisions of paragraphs (a) and (b) of this section, to the facts and circumstances relating to the making of any particular invention, it shall be presumed that an invention made by an employee who is employed or assigned (1) to invent or improve or perfect any art, machine, manufacture, or composition of matter, (2) to conduct or perform research, development work, or both, (3) to supervise, direct, coordinate, or review Government financed or conducted research, development work, or both, or (4) to act in a liaison capacity among governmental or nongovernmental agencies or individuals engaged in such work, falls within the provisions of paragraph (a) of this section, and it shall be presumed that any invention made by any other employee falls within the provisions of paragraph (b) of this section. Either presumption may be rebutted by a showing of the facts and circumstances and shall not preclude a determination that these facts and circumstances justify leaving the entire right, title and interest in and to the invention in the Government employee, subject to law.

(d) In any case wherein the Government neither (1) obtains the entire domestic right, title and interest in and to an invention pursuant to the provisions of paragraph (a) of this section, nor (2) reserves a nonexclusive, irrevocable, royalty-free license in the invention, with power to grant licenses for all governmental purposes, pursuant to the provisions of paragraph (b) of this section, the Government shall leave the entire right, title and interest in and to the invention in the Government employee, subject to law.

[27 FR 7986, Aug. 10, 1962, as amended at 31 FR 12842, Nov. 1, 1966]

§ 7.4 Option to acquire foreign rights.

In any case where it is determined that all domestic rights should be assigned to the Government, it shall further be determined, pursuant to Executive Order 9865 and Government-wide regulations issued thereunder, that the Government shall reserve an option to require the assignment of such rights in all or in any specified foreign countries. In case where the inventor is not required to assign the patent rights in any foreign country or countries to the Government or the Government fails to exercise its option within such period of time as may be provided by regulations issued by the Commissioner of Patents, any application for a patent which may be filed in such country or countries by the inventor or his assignee shall nevertheless be subject to a nonexclusive, irrevocable, royalty-free license to the Government for all governmental purposes, including the power to issue sublicenses for use in behalf of the Government and/or in furtherance of the foreign policies of the Government.

§ 7.7 Notice to employee of determination.

The employee-inventor shall be notified in writing of the Department's determination of the rights to his invention and of his right of appeal, if any. Notice need not be given if the employee stated in writing that he would agree to the determination of ownership which was in fact made.

[31 FR 12842, Oct. 1, 1966]

§ 7.8 Employee's right of appeal.

An employee who is aggrieved by a determination of the Department may appeal to the Commissioner of Patents, pursuant to section 4(d) of Executive Order 10096, as amended by Executive Order 10930, and regulations issued thereunder, by filing a written appeal with the Commissioner, in duplicate, and a copy of the appeal with the Assistant Secretary (Health and Scientific Affairs), within 30 days (or such longer period as the Commissioner may, for good cause, fix in any case) after receiving written notice of such determination.

[27 FR 7986, Aug. 10, 1962, as amended at 31 FR 12842, Oct. 1, 1966]

PART 8—INVENTIONS RESULTING FROM RESEARCH GRANTS, FELLOWSHIP AWARDS, AND CONTRACTS FOR RESEARCH

Sec.
8.0 Policy.
8.1 Conditions to be included in research grants.
8.2 Determination as to domestic rights.
8.3 Licenses to the Government.
8.4 Option to acquire foreign rights.
8.5 Fellowships.
8.6 Contracts for research.
8.7 Cancer chemotherapy industrial research contracts.
8.8 Screening of compounds generated under DHHS grants and awards.

AUTHORITY: Reorg. Plan No. 1 of 1953, 18 FR 2053; 3 CFR, 1953 Supp. E.O. 9865, 12 FR 3907; 3 CFR, 1947 Cum. Supp. E.O. 10096, 15 FR 391; 3 CFR, 1950 Supp.

SOURCE: 20 FR 6749, Sept. 14, 1955, unless otherwise noted.

§ 8.0 Policy.

(a) The Department of Health and Human Services each year is expending large sums in the form of grants for research. These grants are made primarily by the Public Health Service in carrying out its broad responsibility under the Public Health Service Act to promote and coordinate research in the field of health and to make available information concerning such research and its practical application. The scientific and technological advances attributable, in varying degrees to this expenditure of public funds frequently include patentable inventions.

(b) The Department, as a matter of policy, takes the position that the results of research supported by grants of public moneys should be utilized in the manner which would best serve the public interest. It is believed that the public interest will in general be best served if inventive advances resulting therefrom are made freely available to the Government, to science, to industry, and to the general public.

(c) On the other hand, in some cases it may be advisable to permit a utilization of the patent process in order to foster an adequate commercial development to make a new invention widely available. Moreover, it is recognized that inventions frequently arise in the course of research activities which also receive substantial support from other sources, as well as from the Federal grant. It would not be consistent with the cooperative nature of such activities to attribute a particular invention primarily to support received from any one source. In all these cases the Department has a responsiblity to see that the public use of the fruits of the research will not be unduly restricted or denied.

(d) The following conditions have been adopted to govern the treatment of inventions made in these various types of situations. They are designed to afford suitable protection to the public interest while giving appropriate recognition to the legitimate interests of others who have contributed to the invention.

§ 8.1 Conditions to be included in research grants.

Subject to legislative directives or Executive orders providing otherwise, all grants in aid of research shall provide as a condition that any invention arising out of the activities assisted by the grant shall be promptly and fully reported, and shall provide either:

(a) That the ownership and manner of disposition of all rights in and to such invention shall be subject to determination by the Assistant Secretary (Health and Scientific Affairs) or

(b) That the ownership and disposition of all domestic rights shall be left for determination by the grantee institution in accordance with the grantee's established policies and procedures, with such modifications as may be agreed upon and specified in the grant, provided the Assistant Secretary (Health and Scientific Affairs) finds that these are such as to assure that the invention will be made available without unreasonable restrictions or excessive royalties, and provided the Government shall receive a royalty-free license, with a right to issue sublicenses as provided in § 8.3, under any patent applied for or obtained upon the invention.

(c) Wherever practicable, any arrangement with the grantee pursuant to paragraph (b) of this section shall provide in accordance with Executive Order 9865 that there be reserved to the Government an option, for a period to be prescribed, to file foreign patent applications upon the invention.

[20 FR 6749, Sept. 14, 1965, as amended at 31 FR 12842, Oct. 1, 1966]

§ 8.2 Determination as to domestic rights.

Rights in any invention not subject to disposition by the grantee pursuant to § 8.1(b) are for determination by the Assistant Secretary (Health and Scientific Affairs) as follows:

(a) If he finds that there is adequate assurance that the invention will either be effectively dedicated to the public, or that any patent which may be obtained thereunder will be generally available for royalty-free and nonexclusive licensing, the effectuation of these results may be left to the grantee.

(b) If he finds that the invention will thereby be more adequately and quickly developed for widest use and that there are satisfactory safeguards against unreasonable royalties and repressive practices, the invention may be assigned to a competent organization for development and administration for the term of the patent or such lesser period as may be deemed necessary.

(c) If he finds that the interest of another contributing Government agency is paramount to the interest of the Department of Health and Human Services, or when otherwise legally required or in the public interest, the invention may be left for disposition by that agency in accordance with its own policy.

(d) In all other cases, he shall require that all domestic rights in the invention shall be assigned to the United States unless he determines that the invention is of such doubtful importance or the Government's equity in the invention is so minor that protective measures, except as provided in § 8.3, are not necessary in the public interest.

[20 FR 6749, Sept. 14, 1965, as amended at 31 FR 12842, Oct. 1, 1966]

§ 8.3 Licenses to the Government.

Any arrangement or determination as to the disposition of rights in inventions pursuant to §§ 8.1, 8.2, 8.5 or 8.6 shall require that there be reserved under any patent application or patent thereon, domestic or foreign, a nonexclusive, irrevocable, royalty-free license to the Government with power to sublicense for all governmental purposes.

[22 FR 9696, Dec. 4, 1957]

§ 8.4 Option to acquire foreign rights.

In any case where it is determined that all domestic rights should be assigned to the Government, there shall be reserved to the Government, pursuant to Executive Order 9865 (3 CFR, 1943-1948 Comp.) and Government-wide regulations issued thereunder, an option to require the assignment of all rights in the invention in all or in any specified foreign countries. In any case where the inventor is not required to assign the patent rights in any foreign country or countries to the Government, or the Government fails to exercise its option within such period of time as may be provided by regulations issued by the Chairman of the Government Patents Board any application for a patent which may be filed in such country or countries by the inventor or his assignee shall nevertheless be subject to a nonexclusive, irrevocable, royalty-free license to the Government for all governmental purposes, including the power to sublicense for all governmental purposes.

§ 8.5 Fellowships.

In the discretion of the Assistant Secretary (Health and Scientific Affairs), the award of a fellowship to a person not a Government employee may provide for the reporting of any invention made during the term thereof, and for its disposition in accordance with the provisions of § 8.1(a) or for its disposition by the institution at which the research was performed in accordance with its established policies, if applicable to such an invention, which meet the requirements of paragraph (b) of such section.

[22 FR 9695, Dec. 4, 1957, as amended at 31 FR 12842, Oct. 1, 1966]

§ 8.6 Contracts for research.

(a) Contracts for research, with other than nonprofit institutions, shall provide that any invention first conceived or actually reduced to practice in the course of the performance of the contract shall be promptly and fully reported to the Assistant Secretary (Health and Scientific Affairs) for determination by him as to the manner of disposition of all rights in and to such invention, including the right to require assignment of all rights to the United States or dedication to the public. In the exercise of this power the organization head will be guided by the policy specified in § 8.2 with respect to grants.

(b) Contracts for research with nonprofit institutions shall contain provisions as in paragraph (a) of this section except that, if it is determined that the institution's policies and procedures are acceptable as meeting the requirements of § 8.1(b) with respect to grants, the contract may provide, with such special stipulations in the contract as may be deemed necessary in the public interest, for leaving the ownership and disposition of all domestic rights for determination by the contracting institution in accordance with such policies and procedures.

[23 FR 1215, Feb. 27, 1958, as amended at 31 FR 12842, Oct. 1, 1966]

§ 8.7 Cancer chemotherapy industrial research contracts.

Notwithstanding the provisions of § 8.6, the Surgeon General in the negotiation of contracts with other than nonprofit organizations for the cancer chemotherapy research program shall be subject only to such limitations and alternatives as the Assistant Secretary (Health and Scientific Affairs) may approve for such program.

[22 FR 9696, Dec. 4, 1957, as amended at 31 FR 12842, Oct. 1, 1966]

§ 8.8 Screening of compounds generated under DHHS grants and awards.

(a) *General policy.* (1) Chemical compounds having potential medicinal and other utilities are often synthesized or identified during the course of research financed under DHHS research grants and awards. Reporting, filing patent applications on, and determining ownership in inventions relating to such compounds pose problems which require special attention. After a compound has been synthesized, it generally will not constitute a patentable invention under the patent laws of the United States until a specific utility for the compound has been established. It is the policy of the Department that all compounds synthesized or identified during the course of grant-supported research should be adequately screened and tested in Government or non-Government facilities in order that all possible utilities may be ascertained and that any promising compounds may be fully developed for widest possible use. The Department encourages the utilization, whenever appropriate, of the screening services of the Cancer Chemotherapy National Service Center and the Walter Reed Army Institute of Research.

(2) It is the policy of the Department notwithstanding anything to the contrary under patent law of the United States or requirements of U.S. Patent Office practice, to acquire no ownership rights to inventions claiming novel methods of using compounds, where such use inventions are first conceived and reduced to practice solely by the screening or testing orga-

nization without the use of grant funds.

(b) *Screening performed with use of grant funds.* Where nongovernmental facilities are utilized for screening services to be performed and paid for by the grantee (as used in this section, the term "grantee" refers to awardees in addition grantee (as used in this section, the term to grantee institutions) with grant funds, the grantee shall obtain an agreement with the screening organization providing that the screener shall promptly report to the grantee the details of any positive findings of utility for the compound and that all invention rights relating to the compound and its utility shall, as between the grantee and the screener, vest in the grantee. Upon receipt of such report of positive findings, the grantee shall promptly forward copies to DHHS. Ownership of all invention rights to the compound or reported utilities shall be subject to the disposition by the Assistant Secretary (Health and Scientific Affairs) as provided by the terms of the grant or award in accordance with § 8.2, except that where the grantee institution has entered into an Institutional Patent Agreement with the Department pursuant to § 8.1(b), ownership of the invention rights shall be in accordance with the terms of that Agreement.

(c) *Screening performed without the use of grant funds.* Where screening is to be performed at nongovernmental facilities without the use of grant funds, the grantee may proceed to have compounds screened under one of the following arrangements:

(1) *Institutional Patent Agreement.* Where the grantee institution has entered into an Institutional Patent Agreement with the Department under § 8.1(b) of the Department Patent Regulations, the grantee shall enter into an agreement with the screener which shall be consistent with, and will permit the grantee to fully comply with its obligations under such Institutional Patent Agreement. The agreement with the screener shall, as a minimum, provide that ownership of patent rights to inventions resulting from the screening process shall vest, depending on the law of inventorship, in the grantee, the screener, or both, except that such agreement may leave to screening or testing organizations ownership rights to inventions claiming novel methods of using compounds, where such use inventions are first conceived and reduced to practice solely by the screening or testing organization without the use of grant awards. The grantee shall administer all invention rights to the compound and all other invention rights vested in the grantee in accordance with the terms of the Institutional Patent Agreement.

(2) *Patent Agreements for Screening.* Where an Institutional Patent Agreement is not in effect, the grantee shall enter into an agreement with a screener to govern disposition of rights to inventions resulting from the screening. Such agreements shall be in the form prescribed by or as may be approved by the Department and shall be consistent with the policy set forth in paragraph (a) of this section.

(3) *Determination of invention rights prior to screening.* Where a grantee has not entered into an Institutional Patent Agreement, it may, prior to making arrangements for screening, petition the Assistant Secretary (Health and Scientific Affairs) requesting a determination that invention rights pertaining to an identified compound be assigned to the grantee for administration, pursuant to the provisions of § 8.2(b). Determinations under § 8.2(b) normally permit the grantee to grant exclusive licenses for a limited period of time. Such petition must demonstrate that an assignment is required in order to achieve effective screening of the compound and any resulting inventions will thereby be more adequately and quickly developed for widest use.

[34 FR 201, Jan. 7, 1969]

PART 9—USE OF HHS RESEARCH FACILITIES BY ACADEMIC SCIENTISTS, ENGINEERS, AND STUDENTS

Sec.
9.1 Purpose.
9.2 Policy.
9.3 Delegations of authority.
9.4 Criteria.
9.5 Restrictions.

AUTHORITY: 27 Stat. 395, as amended; 20 U.S.C. 91.

SOURCE: 34 FR 18938, Nov. 27, 1969, unless otherwise noted.

§ 9.1 Purpose.

To enhance the availability of DHHS scientific research and study facilities to academic scientists, engineers, and qualified students.

§ 9.2 Policy.

It is the policy of the Department of Health and Human Services in accordance with the policy of the President announced on February 21, 1969, to make research and study facilities of the Department readily available to the scientific community, especially qualified academic scientists and engineers. Unique, unusual, and expensive-to-duplicate facilities at laboratories and other study and research facilities of the Department will be made available to the national scientific community, to the maximum extent practical without serious detriment to the missions of those facilities. It is also the policy of the Department to permit qualified students and graduates of institutions of learning in the several States, and territories, as well as the District of Columbia, to use study and research facilities of the Department. When such facilities are used by academic scientists, engineers, and students, the costs incurred for the operation of the unique or unusual research facilities, as well as of the other facilities, should be funded by the operating agency responsible for the operation of that facility, except for any significant incremental costs incurred in support of research not directly related to an HHS mission.

§ 9.3 Delegations of authority.

(a) The heads of operating agencies are delegated authority for negotiations and decisions as to the use of Department facilities by qualified academic scientists, engineers, and students.

(b) The heads of operating agencies may (and are encouraged to) redelegate to the heads of their respective component organizations, with the power to further redelegate to laboratory directors, the authority for negotiations and decisions as to the use of departmental facilities. Appropriate use shall be made of advisory groups in formulating their decisions.

§ 9.4 Criteria.

(a) The official permitting use of Department facilities must determine that it would be consistent with the programs of his activity to participate. Facilities may be made available provided the use of such facilities will be of direct benefit to the objectives of the academic scientist, or engineer, or student, with the prospect of fruitful interchange of ideas and information between Department personnel and the academic scientist, or engineer, or student, and such use will not interfere with the Department program.

(b) The official permitting use of Department facilities will furnish the non-Government user with safety requirements or operating procedures to be followed. Such requirements or procedures are to include the requirement to report to the permitting official any accident involving the non-Government user.

(c) The official delegated authority for approving the use of Department facilities will not permit the use of laboratory facilities unless he determines:

(1) That facilities are available for the period desired; and

(2) That the proposed research will not interfere with regular Department functions or needs, nor require the subsequent acquisition of additional equipment by the Department.

§ 9.5 Restrictions.

(a) Each individual authorized to use Department facilities will be expected to use the facilities and equipment with customary care and otherwise conduct himself in such manner as to complete his research or study within any time limits prescribed.

(b) Each individual authorized to use HHS facilities may not be authorized to sign requisitions for supplies and equipment.

(c) Any official approving the use of HHS facilities should seek an agreement, executed by non-Government users, absolving the Federal agency of liability in case of personal injury, death, and failure or damage to the non-Government user's experiments or equipment. The agreement must also contain a statement that the non-Government user will comply with all safety regulations and procedures while using such facilities.

PART 10—DEPARTMENTAL FELLOWSHIP REVIEW PANEL

Sec.
10.1 Purpose.
10.2 Definitions.
10.3 Departmental Fellowship Review Panel; Departmental Fellowship Review Board; in general.
10.4 Procedural safeguards.
10.5 Hearing before Board or a Hearing Officer.
10.6 Preliminary decision; initial decision; final decision.
10.7 Notice to the individual concerned and opportunity to submit comment on preliminary decision and initial decision.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 28 FR 8408, Aug. 16, 1963, unless otherwise noted.

§ 10.1 Purpose.

This part establishes a Departmental Fellowship Review Panel, from which Departmental Fellowship Review Boards will be selected, for the purpose of providing hearings where an opportunity for such hearing is provided for in applicable procedures of a constituent agency, in cases where such constituent agency has found substantial reason for a belief that a fellowship (or traineeship) award should be denied or discontinued by the constituent agency making the award, on grounds involving, in accordance with applicable criteria, the moral character or loyalty of the applicant for, or holder of, the award.

§ 10.2 Definitions.

(a) "Departmental Fellowship Review Panel" (also referred to as "Panel") means a panel of 12 members selected by the Secretary, for such terms as may be designated by him, which shall include at least four representatives of the legal discipline and at least four representatives of the field of higher education. At least eight members of the Panel shall be selected from sources outside the Department.

(b) "Panel Chairman" means one of the Panel members designated by the Secretary to serve as Chairman of the Panel for such time as shall be indicated in the designation.

(c) "Departmental Fellowship Review Board" (also referred to as "Board") means not less than three members of the Panel designated by the Panel Chairman for the consideration of one or more cases submitted by a constituent agency. At least two Board members shall be persons other than employees of the Department, and the Board shall include at least one representative of the legal discipline and one from the field of higher education. In no event shall anyone who participated in any previous consideration of a case be eligible to serve on a board in connection with its consideration of that case. The Panel Chairman may designated himself as one of the members of a Board or as the Chairman thereof.

(d) "Board Chairman" means a member of a Departmental Fellowship Review Board who has been designated as Chairman of such Board by the Panel Chairman.

(e) "Constituent agency" means the U.S. Commissioner of Education or the Commissioner of Vocational Rehabilitation.

(f) "Submission by a constituent agency" means a referral (of an individual's request for a hearing) by the U.S. Commissioner of Education pursuant to § 147.5 of this title or by the Commissioner of Vocational Rehabilitation pursuant to § 401.88a of this title, or similar provisions contained in manual or other issuances of a constituent agency.

(g) "Preliminary decision" means the recommended decision, including findings of fact and conclusions reached in the light of the applicable criteria, prepared by a Hearing Officer and submitted to the Board.

(h) "Initial decision" means the recommended decision of the Board, which shall include (1) findings of fact and conclusions reached in the light of the applicable criteria and, when applicable, (2) the reasons for any changes or modifications made by the Board in a preliminary decision.

(i) The words "Department" and "Departmental" refer to the U.S. Department of Health and Human Services.

(j) "Secretary" means the Secretary of Health and Human Services.

(k) "Applicable criteria" means those set forth in § 147.4 of this title in the case of a submission by the Commissioner of Education; or in § 401.88a (a) and (b) of this title in the case of a submission by the Commissioner of Vocational Rehabilitation; or in manual or other issuances of a constituent agency pertaining to denial or discontinuance of fellowship (or traineeship) awards on grounds involving moral character or loyalty.

§ 10.3 Departmental Fellowship Review Panel; Departmental Fellowship Review Board; in general.

Upon receipt of a submission from a constituent agency, the Chairman of the Departmental Fellowship Review Panel shall refer the case to a Departmental Fellowship Review Board, constituted as provided in § 10.2(c), for the purpose of recommending to the constituent agency, on the basis of a preponderance of the evidence, after affording to the individual concerned an opportunity for a fair hearing, whether the fellowship (or traineeship) award should be denied or discontinued by the constituent agency making the awards, on grounds involving, in accordance with applicable criteria, the moral character or loyalty of the applicant for, or holder of the award. The Board's recommendation shall be embodied in an initial decision in accordance with § 10.2(h).

§ 10.4 Procedural safeguards.

The Board shall take appropriate steps to afford the individual concerned an opportunity for a fair hearing, which shall include provisions designed to assure to such individual the following:

(a) Sufficient notice of the issues to be considered;

(b) An opportunity to be represented by counsel;

(c) Disclosure of as much of all matters of an evidentiary nature as may be permitted within the framework of applicable laws, regulations, and other requirements (e.g., those pertaining to FBI reports);

(d) An opportunity to appear in person (and to present witnesses in his behalf) or, at the option of the individual concerned, to submit his case in whole or in part in writing (e.g., through interrogatories, affidavits, exhibits, etc.);

(e) An opportunity to cross-examine persons either orally or through written interrogatories, to the extent provided by Executive Order 10865 of February 20, 1960 (relating to safeguarding of classified information within industry), except that functions vested by that Order in the head of a department shall be performed by the head of the appropriate operating agency;

(f) An option to the individual concerned to have the hearing open or closed to the public;

(g) A determination of the place of the hearing which takes into consideration the convenience of the individual concerned and any witnesses who might be testifying at the hearing.

§ 10.5 Hearing before Board or a Hearing Officer.

The hearing may be conducted, as determined by the Board Chairman, before the full Board as the hearing body, or before a Hearing Officer. The Hearing Officer may be (a) one of the members of the Board or (b) a nonmember who is qualified as a Hearing Officer under the Administrative Procedure Act.

§ 10.6 Preliminary decision; initial decision; final decision.

When the hearing is conducted by the Board itself, it shall prepare an initial decision for submission to the constituent agency. When the hearing is conducted before a Hearing Officer, the Hearing Officer shall prepare a preliminary decision for submission to the Board. The preliminary decision shall be reviewed by the Board and shall become the initial decision of the Board unless, and to the extent that, it is changed or modified by the Board. The initial decision of the Board shall be transmitted to the constituent agency, and shall become the final decision of the constituent agency, unless, and to the extent that, it is changed or modified by the constituent agency.

§ 10.7 Notice to the individual concerned and opportunity to submit comment on preliminary decision and initial decision.

Copies of the preliminary decision, if any, and of the initial decision shall be mailed promptly by the Hearing Officer or the Board, as the case may be, to the individual, or his counsel, with a notice affording him an opportunity to submit written comments thereon, within a specified reasonable time, to the Board in the case of a preliminary decision, and to the constituent agency in the case of an initial decision.

PART 11—COMMITTEE MANAGEMENT

Sec.
11.1 Scope.
11.2 Definitions.
11.3 General policies.
11.4 Guidelines for the creation and renewal of advisory committees.
11.5 Operation of advisory committees.
11.6 Administrative remedies.
11.7 Department committee management officer.

AUTHORITY: 86 Stat. 770, 5 U.S.C. App. I et seq. and Office of Management and Budget Circular A-63, 39 FR 12389, April 5, 1974.

SOURCE: 41 FR 35654, Aug. 23, 1976, unless otherwise noted.

§ 11.1 Scope.

(a) This part contains the Department's regulations implementing the Federal Advisory Committee Act.

(b) The regulations provided under this part apply to all advisory committees providing advice to the Department or any of its officials except to the extent that statutory provisions governing an advisory committee may specifically provide otherwise.

§ 11.2 Definitions.

(a) "Act" means the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App. I et seq.).

(b) "Advisory committee," subject to exclusions described in paragraph (b)(3) of this section means any committee, board, commission, council, conference, panel, task force, or other similar group or any subcommittee or other subgroup thereof which is established by statute or reorganization plan; or established or utilized by the Department in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.

(1) Although no single factor is determinative in deciding whether a group is an advisory committee, the following factors will be considered:

(i) Fixed membership including at least one person who is not a full-time Federal employee;

(ii) Establishment by a Federal official or law; or if not Federally established, the initiative for its use as an advisory body for the Federal Government comes from a Federal official rather than from a private group;

(iii) A purpose of providing advice regarding a particular subject or particular subjects;

(iv) An organizational structure (e.g.), officers and a staff;

(v) Regular or periodic meetings.

(2) The functions of an advisory committee are to be solely advisory. Where a group provides some advice to the Department, but the group's advisory function is incidental and inseparable from other (e.g., operational) functions, the provisions of this part do not apply. However, if the advisory function is separable, the group is subject to this part to the extent that the group operates as an advisory committee.

(3) Groups excluded from the effect of the provisions of this part include:

(i) Any committee which is composed wholly of full-time officers or employees of the Federal Government;

(ii) Any committee which is exclusively operational in nature (e.g., has functions which include making or implementing decisions, as opposed to the offerings of advice or recommendations);

(iii) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program;

(iv) Any state or local committee or similar group established to advise State or local officials or agencies;

(v) The term "advisory committee" is not intended to include persons or organizations which have contractual relationships with the Department except in those cases where the criteria described in paragraph (b)(1) of this section are present:

(c) "Department" means the Department of Health and Human Services.

(d) "Secretary" means the Secretary of Health and Human Services, or his designee.

(e) "OMB Secretariat" is the office within the Office of Management and Budget to administer the provisions of OMB Circular A-63.

(f) "Presidential advisory committee" means an advisory committee which advises the President.

(g) "Statutory advisory committee" is one established by the Congress or required to be established by the Congress.

(h) "Non-statutory advisory committee" is one established by the President or other Federal officer, including a committee which was authorized by, but not established by or required to be established by statute.

§ 11.3 General policies.

(a) In interpreting this part, Department officials shall be guided by the Act and the intent of Congress in enacting the Act. These considerations include:

(1) Limiting the number of advisory committees to those that are essential and terminating any committee not fulfilling its purpose;

(2) Insuring effective use of advisory committees and their recommendations, while assuring that decisionmaking authority is retained by the responsible Department officers;

(3) Providing clear goals, standards and uniform procedures with respect to creation, operation, and duration of committees;

(4) Insuring that adequate information is provided to the President, the Congress and the public regarding advisory committees;

(5) Insuring adequate opportunities for access by the public to advisory committee meetings, and

(6) Providing uniform requirements for advisory committee reports and their availability to the public.

(b) Department officials shall be guided by the HHS Standards of Conduct (45 CFR 73.735), the Federal Personnel Manual, and the Federal Conflict of Interest statutes (18 U.S.C. 201 et seq.), in preventing conflicts of interest or appearance of conflicts of interest on the part of Department employees concerned with advisory committees, advisory committee members and staff, and consultants and experts concerned with advisory committees.

§ 11.4 Guidelines for the creation and renewal of advisory committees.

(a) Advisory committees shall be established by the Department only when they are determined to be essential. Their number shall be kept to the minimum necessary. They shall be terminated when they are no longer carrying out the purposes for which they were established or such purposes are no longer regarded as necessary to the operation of the department.

(b) No advisory committee shall be established or renewed unless such establishment or renewal is specifically authorized by statute, or established by statute or the President, or determined as a matter of formal record by the Secretary (after consultation with the OMB Secretariat) to be in the public interest in connection with the performance of duties imposed on the Department by law. In seeking such determination by the Secretary, the responsible official requesting establishment or continuance of an advisory committee shall make a request in writing to the Secretary. The request shall describe the nature or purpose of the proposed committee; the reasons why it is needed, including an explanation of why the functions of the proposed committee cannot be performed by Department employees, by an existing committee, or by some other means; and a description of the plan to attain balanced membership on the proposed committee in terms of the points of view to be represented, functions to be performed, and expected participation by women and minorities.

(c) No advisory committee shall meet or take any action until:

(1) In the case of establishment or renewal, in appropriate instances, the OMB Secretariat has been consulted.

(2) A formal charter has been approved by the Secretary;

(3) Public announcement of its establishment or renewal has been made in the FEDERAL REGISTER, at least fifteen days prior to the filing of the committee's charter.

(d) Copies of the charter shall be provided by the Department to the appropriate standing committees of the Senate and House of Representatives and to the Library of Congress. In the case of Presidential Committees a copy of the charter shall also be provided to the Office of Management and Budget. The charter shall be in a form prescribed by the Department Committee Management Officer and shall contain the following information:

(1) The committee's official designation;

(2) The committee's objectives and the scope of its activity;

(3) The period of time necessary for the committee to carry out its purpose;

(4) The official to whom the committee reports;

(5) The person responsible for providing the necessary support for the committee;

(6) A description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(7) The estimated annual operating costs in dollars and man-years for such committee;

(8) The estimated number and frequency of committee meetings;

(9) The committee's termination date, if less than two years from the date of the committee's establishment; and

(10) The date the charter is approved by the Secretary.

(e) With regard to subgroups, if all of its members are members of the parent committee, requisite information may be set forth in the charter of the parent committee. In the event a subgroup includes members who are not all drawn from the parent committee, it shall be separately chartered. In addition, if not incorporated in the charter of the parent committee, subgroups shall be separately chartered.

(f) No advisory committee shall be created if its functions could otherwise be performed effectively within the Department or by an existing committee.

(g) The membership of an advisory committee shall be fairly balanced in terms of the points of view represented and the committee's functions. Appropriate safeguards shall be taken to assure that an advisory committee's advice and recommendations will not be inappropriately influenced by any special interest, but shall instead be the result of the advisory committee's independent judgment.

(h) In the selection of committee members, there shall be no discrimination on the basis of race, color, national origin, religion, age, sex, or handicap.

(i) Each advisory committee shall prepare an annual report describing its membership, functions, recommendations and other actions. A copy of the report shall be submitted to the Department Committee Management Officer who shall make copies of them available to the public, upon request. In addition, a copy of the report shall be filed with the Department's Library and made available to the public. Notice of the availability of the Annual Report shall be published in the FEDERAL REGISTER no later than sixty days after its completion. Such notice shall indicate its availability to the public.

(j) Unless specifically provided otherwise by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. For purposes of this provision, "Presidential directive" refers to an executive order, executive memorandum or an OMB directive.

(k) Decisions regarding actions or policies relating to matters dealt with by a Department advisory committee shall be made solely by Department officials.

(l) Except for committees created by Congress with a duration in excess of two years, no Department advisory committee shall continue in existence for a period of more than two years from its establishment unless renewed prior to the date of its scheduled termination by action of the Congress, the President, or the Secretary as appropriate. In the case of a committee continued by the Congress or the President beyond its scheduled termination date, a charter shall be approved by the Secretary and the requirements set forth in paragraph (c) of this section complied with before any meeting is held. To renew a committee the Secretary shall determine that such renewal is necessary and inform the OMB Secretariat of his determination and the reasons for it. Renewal determinations shall be made not more than sixty days before the scheduled date of termination. If the OMB Secretariat concurs, the Department Committee Management Officer shall notify the responsible Department officials who shall publish notice of the renewal in the FEDERAL REGISTER. A new charter shall also be approved by the Secretary.

(m) Any advisory committee which is renewed may continue for no more than a two-year period unless prior to the expiration of that period it is renewed for another two-year period in accord with the above provisions.

§ 11.5 Operation of advisory committees.

(a) *Meetings.* The provisions of this section shall apply to meetings of all Department advisory committees and all subgroups.

(1) *Calling of meetings and agenda.* (i) No advisory committee shall hold any meetings except at the call of or with the advance approval of the designated Department official.

(ii) No meeting shall be held in the absence of a quorum. Unless otherwise established in the charter of the committee, a quorum shall consist of a majority of the committee's authorized membership, including ex officio members. In addition, such members shall have full voting rights.

(iii) Each meeting of an advisory committee shall be conducted in accordance with an agenda approved by the designated Department official. Ordinarily, copies of the agenda shall be distributed to the members of the committee prior to the date of the meeting. The agenda shall list the matters to be considered at the meeting and shall indicate whether any part of the meeting is concerned with matters which are within the exemptions of the Freedom of Information Act, 5 U.S.C. 552(b).

(2) *Notice of meeting.* (i) Except when the Director of the Office of Management and Budget determines otherwise for reasons of national security, or except as otherwise provided herein, notice of each advisory committee meeting shall be published in the FEDERAL REGISTER at least fifteen days prior to the meeting. The fact that a meeting is closed to the public pursuant to paragraph 10(d) of Pub. L. 92-463 shall not affect the foregoing requirement.

(*a*) The notice shall state the name of the advisory committee, the time and place of the meeting, and the purposes of the meeting and shall include a summary of the agenda.

(*b*) The notice shall state the extent to which the public will be permitted to attend or participate in the meeting. If the meeting will be closed to the public, the notice shall also state the reasons for closing, including appropriate citation to the Freedom of Information Act.

(ii) In addition to notice in the FEDERAL REGISTER, the Executive Secretary of each advisory committee shall maintain a list of persons and organizations who have requested to be notified of all meetings and notify them by mail in advance of any meeting. Other forms of notice, such as press releases and notices in professional journals shall be used to the extent practicable.

(iii) Meetings may be held only in emergency situations unless notice of the meeting has been published in the FEDERAL REGISTER at least fifteen days prior to the meeting. Such meetings shall be kept to a minimum, and whenever feasible, rescheduled for a later date. When a meeting must be called without fifteen days notice being given, the following steps shall be taken, to the extent possible:

(*a*) Advance notice shall be published in the FEDERAL REGISTER.

(*b*) Other forms of notice shall be utilized whenever practicable.

(*c*) In the case of meeting notices published in accordance with paragraphs (a)(2)(iii) and (a) and (b) of this section, the notice shall contain an explanation for the failure to give fifteen days notice.

(3) *Public participation at meetings.* (i) Subject to the exceptions described in paragraph (a)(6) of this section each advisory committee meeting shall be open to the public, and interested persons shall be permitted to attend, appear before, or file statements with any advisory committee.

(ii) The Executive Secretary of each committee shall, with respect to any advisory committee meeting, all or part of which is open to the public, assure compliance with the following rules:

(*a*) Meetings shall be held at reasonable times and places that are reasonably accessible to members of the public. Whenever feasible, Government facilities shall be used and meetings held in places involving the least expense to the Department.

(*b*) The size of the meeting room shall be reasonable, considering such factors as the size of the advisory committee, the number of members of the public expected to seek to attend, and the resources and facilities available to the Department.

(*c*) Any member of the public who wishes to do so shall be permitted to file a written statement with the committee, before or after a meeting.

(*d*) To the extent that the time available for a meeting permits, interested persons may be permitted to present oral statements. Any person seeking to present an oral statement to a committee may be required to obtain advance approval for such participation from the committee chairman or the committee's Executive Secretary.

(*e*) Participation by members of the public at committee meetings or questioning of committee members or other participants shall only be permitted with the authorization of the committee chairman.

(4) *Minutes and transcripts of meetings.* (i) Detailed minutes shall be kept of each meeting of each advisory committee, including meetings of formal and informal subgroups. The Executive Secretary of each advisory committee shall keep the minutes or designate some person to keep the minutes. Minutes need not be kept if a verbatim transcript is made.

(ii) The minutes shall include at least the following: The time and place of the meeting; a list of advisory committee members and staff and full-time Federal employees present at the meeting; a detailed summary of matters discussed, including different positions advanced by members and conclusions reached by the committee; copies of all reports received, issued, or approved by the advisory committee; an explanation of the extent to which the meeting was open to the public; and explanation of the extent of public participation, including a list of members of the public who presented oral or written statements; and an estimate of the number of members of the public who attended the meeting.

(iii) Within a reasonable time after the meeting the minutes shall be completed and submitted to the chairman of the advisory committee.

(iv) Within a reasonable time after receipt of the minutes the chairman of the advisory committee shall certify to the accuracy of the minutes and submit them to the Executive Secretary for submission to the official advised by the committee.

(5) *Designated Department employee.* (i) Each advisory committee meeting shall be attended by a Department employee designated by the Department official responsible for the Committee. Ordinarily, the employee so designated shall serve the advisory committee on a continuing basis.

(ii) No advisory committee shall conduct a meeting in the absence of the designated Department employee. If simultaneous subgroup meetings are to be held, each subgroup shall have a designated Department employee in attendance.

(iii) The designated Department employee is authorized to adjourn any advisory committee meeting, whenever he determines adjournment to be in the public interest. Inter alia, the designated Department employee shall adjourn the meeting in the event of unwarranted departure from a meeting's agenda.

(6) *Closing advisory committee meetings.* (i) Subsection 10(d) of the Act provides that the provisions concerning open meetings and public participation shall not apply to any advisory committee which the President, or the head of the department to which the advisory committee reports, determines is concerned with matters listed in 5 U.S.C. 552(b). The Department's regulation implementing that Act is found at 45 CFR Part 5. Department officials shall be guided by the policies set forth in that regulation in making determinations to close meetings. In applying the provisions of 5 U.S.C. 552(b) to advisory committee meetings, liberal interpretations shall be assumed with respect to the openness of such meetings. Any determination to close a meeting (or portion) shall restrict such closing to the shortest reasonable time.

(ii) In applying the Freedom of Information Act exemptions to advisory committee meetings, the following rules shall be followed:

(*a*) If a meeting (or portion) will have the express purposes of discussing an existing document which is within one of the exemptions set forth in 5 U.S.C. 552(b), the meeting (or portion) may be closed to the public.

(*b*) Meetings closed solely on the basis that a document exempt from mandatory disclosure under exemption (5) (concerning intra-agency and inter-agency memoranda and letters) is to be discussed, may only be closed if the Secretary determines that it is essential to close such meeting (or portion) to protect the free exchange of internal views of committee members and avoid undue interference with Department or committee operation.

(*c*) A meeting (or portion) involving solely the internal expression of views and judgments of committee members, and not the discussion of an exempt document may be closed if a finding is made that is essential to close the meeting (or portion) to protect the free exchange of members views and avoid undue interference with Department or committee operations, and such views if reduced to writing would be protected from mandatory disclosure under section 552(b)(5) of Title 5 U.S.C. When feasible, the public shall be given an opportunity to present relevant information and views to the committee. Concurrence for closing such a meeting shall be obtained from the Office of the General Counsel and the Office of Public Affairs.

(*d*) If a meeting (or portion) will have the express purpose of discussing a matter which is within one of the exemptions set forth in 5 U.S.C. 552(b), other than exemption (5), the meeting (or portion) may be closed to the public even though no specific exempt document is to be discussed.

(*e*) If the subject of a meeting will be such that paragraphs (a)(6)(ii) (*a*) through (*d*) inclusive above do not furnish a basis for closing it, the meeting shall be open to the public.

(*f*) When a advisory committee seeks to have a meeting (or portion) closed, the Executive Secretary shall make a request in writing for a determination by the Secretary. Such a request shall set forth the reasons why the meeting (or portion) should be closed. Whenever practical, the request shall be submitted at least sixty days before the scheduled date of the meeting.

(*g*) If the Secretary finds the request to be warranted and in accord with the policy of the Act and the Freedom of Information Act, the request shall be granted. The determination made by the Secretary shall be in writing and contain specific reasons for closing the meeting (or portion). Determinations made by authorized designees must be reviewed and approved by the Office of the General Counsel and the Office of Public Affairs.

(*h*) If a meeting is to be held for the consideration of several separable matters, not all of which are within the exemptions of 5 U.S.C. 552(b), only the portion of the meeting dealing with exempt matters may be closed.

(*i*) When part of a meeting is to be closed, the agenda shall be arranged to facilitate attendance by the public at the open portion of the meeting.

(*j*) When a meeting (or portion) is closed, only members of the committee, its staff, and Federal employees shall be permitted to attend.

(*k*) When a meeting (or portion) is closed, members of the advisory committee shall not disclose the matters discussed except to other members of the advisory committee, the staff of the advisory committee or Department employees.

(*l*) The Department Committee Management Officer may review, after the meeting, the appropriateness of any determination to close a meeting (or portion) and require that corrective action be taken with respect to the particular advisory committee or general procedures concerning the closing of meetings.

(*m*) When a meeting (or portion) is closed, and detailed minutes are not to be made available in their entirety to the public, the advisory committee shall prepare and make available to the public within fourteen days of the close of the meeting a summary of its activities and related matters which are informative to the public consistent with the policy of 5 U.S.C. 552(b). Notice of the availability of such a summary shall be incorporated in the notice of the meeting published in the FEDERAL REGISTER.

(b) *Access to records.* (1) All records, reports, and other documents of each advisory committee shall be available for public inspection and copying pursuant to the Department's public information regulation. Documents referred to herein include the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee.

(2) Advisory committee records determined to be available for public inspection are to be made available for inspection and copying at a single location in the offices of the advisory committee or the Department organizational component to which the advisory committee reports. The advisory committee or appropriate Department organizational component shall make available to any person copies of transcripts of committee proceedings or meetings at cost determined in accordance with the appropriate fee schedule.

(3) Advisory committee records are maintained and disposed of according to procedures prescribed in the Department's Records Management Manual.

§ 11.6 Administrative remedies.

(a) Any person whose request for access to an advisory committee document is denied may seek administrative review in accord with the Department's Freedom of Information Act regulation.

(b) Any person whose request for access to an advisory committee meeting is denied after publication of the notice of the meeting in the FEDERAL REGISTER may appeal to the appropriate official designated at 45 CFR 5.82. If the decision on appeal is adverse to the request or concurrence of the Assistant Secretary for Public Affairs or his designee, shall be obtained.

§ 11.7 Department committee management officer.

The Secretary shall designate a Department employee to implement this part and consult with the Office of Management and Budget on his behalf.

PART 12—DISPOSAL AND UTILIZATION OF SURPLUS REAL PROPERTY FOR PUBLIC HEALTH PURPOSES

Sec.

12.1 Definitions.
12.2 Scope.
12.3 General policies.
12.4 Limitations.
12.5 Awards.
12.6 Notice of available property.
12.7 Applications for surplus real property.
12.8 Assignment of surplus real property.
12.9 General disposal terms and conditions.
12.10 Compliance with the National Environmental Policy Act of 1969 and other related Acts (environmental impact).
12.11 Special terms and conditions.
12.12 Utilization.
12.13 Form of conveyance.
12.14 Compliance inspections and reports.
12.15 Reports to Congress.

EXHIBIT A

AUTHORITY: Sec. 203, 63 Stat. 385, as amended; 40 U.S.C. 484.

SOURCE: 45 FR 72173, Oct. 31, 1980, unless otherwise noted.

§ 12.1 Definitions.

(a) "Act" means the Federal Property and Administrative Services Act of 1949, 63 Stat. 377 (40 U.S.C. 471 et seq.). Terms defined in the Act and not defined in this section have the meanings given to them in the Act.

(b) "Accredited" means having the approval of a recognized accreditation board or association on a regional, State, or national level, such as a State Board of Health. "Approval" as used above describes the formal process carried out by State Agencies and institutions in determining that health organizations or programs meet minimum acceptance standards.

(c) "Administrator" means the Administrator of General Services.

(d) "Assigned property" means real and related personal property which, in the discretion of the Administrator or his designee, has been made available to the Department for transfer for public health purposes.

(e) "Department" means the U.S. Department of Health and Human Services.

(f) "Disposal agency" means the executive agency of the Government which has authority to assign property to the Department for transfer for public health purposes.

(g) "Excess" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

(h) "Fair market value" means the highest price which the property will bring by sale in the open market by a willing seller to a willing buyer.

(i) "Holding agency" means the Federal agency which has control over and accountability for the property involved.

(j) "Nonprofit institution" means any institution, organization, or association, whether incorporated or unincorporated, no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual, and which has been held to be tax-exempt under section 501(c)(3) of the Internal Revenue Code of 1954.

(k) "Off-site property" means surplus buildings, utilities and all other removable improvements, including related personal property, to be transferred by the Department for removal and use away from the site for public health purposes.

(l) "On-site" means surplus real property, including related personal property, to be transferred by the Department for use in place for public health purposes.

(m) "Public benefit allowance" means a discount on the sale or lease price of real property transferred for public health purposes, representing any benefit determined by the Secretary which has accrued or may accrue to the United States thereby.

(n) "Related personal property" means any personal property: (1) Which is located on and is (i) an integral part of, or (ii) useful in the operation of real property; or (2) which is determined by the Administrator to be otherwise related to the real property.

(o) "Secretary" means the Secretary of Health and Human Services.

(p) "State" means a State of the United States, and includes the District of Columbia, the Commonwealth of Puerto Rico, and the Territories and possessions of the United States.

(q) "Surplus" when used with respect to real property means any excess real property not required for the needs and the discharge of the responsibilities of all Federal agencies as determined by the Administrator.

§ 12.2 Scope.

This part is applicable to surplus real property located within any State which is appropriate for assignment to, or which has been assigned to, the Department for transfer for public health purposes, as provided for in section 203(k) of the Act.

§ 12.3 General Policies.

(a) It is the policy of the Department to foster and assure maximum utilization of surplus real property for public health purposes, including research.

(b) Transfers may be made only to States, their political subdivisions and instrumentalities, tax-supported public health institutions, and nonprofit public health institutions which have been held tax exempt under section 501(c)(3) of the Internal Revenue Code of 1954.

(c) Real property will be requested for assignment only when the Department has determined that the property is suitable and needed for public health purposes. The amount of real and related personal property to be transferred shall not exceed normal operating requirements of the applicant. Such property will not be requested for assignment unless it is needed at the time of application for public health purposes or will be so needed within the immediate or foreseeable future. Where construction or major renovation is not required or proposed, the property must be placed into use within twelve (12) months from the date of transfer. When construction or major renovation is contemplated at the time of transfer, the property must be placed in use within 36 months from the date of transfer. If the applicable time limitation is not met, the transferee shall either commence payments in cash to the Department for each month thereafter during which the proposed use has not been implemented or take such other action as set forth in § 12.12 as is deemed appropriate by the Department. Such monthly payments shall be computed on the basis of the current fair market value of the property at the time of the first payment by subtracting therefrom any portion of the purchase price paid in cash at the time of transfer, and by dividing the balance by the total number of months in the period of restriction. If the facility has not been placed into use within eight (8) years of the date of the deed, title to the property will be revested in the United States, or, at the discretion of the Department, the restrictions and conditions may be abrogated in accordance with § 12.9

(d) Transfers will be made only after the applicant has certified that the proposed program is not in conflict with State or local zoning restrictions, building codes, or similar limitations.

(e) Organizations which may be eligible include those which provide care and training for the physically and mentally ill, including medical care of the aged and infirm, clinical services, other public health services (including water and sewer), or similar services devoted primarily to the promotion and protection of public health. Services which have as their principal purpose the providing of custodial or domiciliary care are not eligible. The property applied for must be for a purpose which the eligible organization is authorized to carry out.

(f) An applicant's plan of operation will not be approved unless it provides that the applicant will not discriminate because of race, color, sex, handicap, or national origin in the use of the property.

§ 12.4 Limitations.

(a) Surplus property transferred pursuant to this part will be disposed of on an "as is, where is," basis without warranty of any kind.

(b) Unless excepted by the General Services Administrator in his assignment, mineral rights will be conveyed together with the surface rights.

§ 12.5 Awards.

Where there is more than one applicant for the same property, it will be awarded to the applicant having a program of utilization which provides, in the opinion of the Department, the greatest public benefit. Where the property will serve more than one program, it will be apportioned to fit the needs of as many programs as is practicable.

§ 12.6 Notice of available property.

Reasonable publicity will be given to the availability of surplus real property which is suitable for assignment to the Department for transfer for public health uses. The Department will establish procedures reasonably calculated to afford all eligible users having a legitimate interest in acquiring the property for such uses an opportunity to make an application therefor. However, publicity need not be given to the availability of surplus real property which is occupied and being used for eligible public health purposes at the time the property is declared surplus, the occupant expresses interest in the property, and the Department determines that it has a continuing need therefor.

§ 12.7 Applications for surplus real property.

Applications for surplus real property for public health purposes shall be made to the Department through the Regional Office specified in the notice of availability.

§ 12.8 Assignment of surplus real property.

(a) Notice of interest in a specific property for public health purposes will be furnished the General Services Administrator by the Department at the earliest possible date.

(b) Requests to the Administrator for assignment of surplus real property to the Department for transfer for public health purposes will be based on the following conditions:

(1) The Department has an acceptable application for the property.

(2) The applicant is willing, authorized, and in a position to assume immediate care, custody, and maintenance of the property.

(3) The applicant is able, willing and authorized to pay the administrative expenses incident to the transfer.

(4) The applicant has the necessary funds, or the ability to obtain such funds, to carry out the approved program of use of the property.

§ 12.9 General disposal terms and conditions.

(a) Surplus real property transfers under this part will be limited to public health purposes. Transferees shall be entitled to a public benefit allowance in terms of a percentage which will be applied against the value of the property to be conveyed. Such an allowance will be computed on the basis of benefits to the United States from the use of such property for public health purposes. The computation of such public benefit allowances will be in accordance with Exhibit A attached hereto and made a part hereof.

(b) A transfer of surplus real property for public health purposes is subject to the disapproval of the Administrator within 30 days after notice is given to him of the proposed transfer.

(c) Transfers will be on the following terms and conditions:

(1) The transferee will be obligated to utilize the property continuously in accordance with an approved plan of operation.

(2) The transferee will not be permitted to sell, lease or sublease, rent, mortgage, encumber, or otherwise dispose of the property, or any part thereof, without the prior written authorization of the Department.

(3) The transferee will file with the Department such reports covering the utilization of the property as may be required.

(4) In the event the property is sold, leased or subleased, encumbered, disposed of, or is used for purposes other than those set forth in the approved plan without the consent of the Department, all revenues or the reasonable value of other benefits received by the transferee directly or indirectly from such use, as determined by the Department, will be considered to have been received and held in trust by the transferee for the account of the United States and will be subject to the direction and control of the Department. The provisions of this paragraph shall not impair or affect the rights reserved to the United States in paragraph (c)(6) of this section, or the right of the Department to impose conditions to its consent.

(5) Lessees will be required to carry all perils and liability insurance to protect the Government and the Government's residual interest in the property. Transferees will be required to carry such flood insurance as may be required by the Department pursuant to Pub. L. 93-234. Where the transferee elects to carry insurance against damages to or loss of on-site property due to fire or other hazards, and where loss or damage to transferred Federal surplus real property occurs, all proceeds from insurance shall be promptly used by the transferee for the purpose of repairing and restoring the property to its former condition, or replacing it with equivalent or more suitable facilities. If not so used, there shall be paid to the United States that part of the insurance proceeds that is attributable to the Government's residual interest in the property lost, damaged, or destroyed in the case of

leases, attributable to the fair market value of the leased facilities.

(6) With respect to on-site property, in the event of noncompliance with any of the conditions of the transfer as determined by the Department, title to the property transferred and the right to immediate possession shall, at the option of the Department, revert to the Government. In the event title is reverted to the United States for noncompliance or voluntarily reconveyed, the transferee shall, at the option of the Department, be required to reimburse the Government for the decrease in value of the property not due to reasonable wear and tear or acts of God or attributable to alterations completed by the transferee to adapt the property to the public health use for which the property was transferred. With respect to leased property, in the event of noncompliance with any of the conditions of the lease, as determined by the Department, the right of occupancy and possession shall, at the option of the Department, be terminated. In the event a leasehold is terminated by the United States for noncompliance or is voluntarily surrendered, the lessee shall be required at the option of the Department to reimburse the Government for the decrease in value of the property not due to reasonable wear and tear or acts of God or attributable to alterations completed by the lessee to adapt the property to the public health use for which the property was leased.

With respect to any reverter of title or termination of leasehold resulting from noncompliance, the Government shall, in addition thereto, be reimbursed for such costs as may be incurred in recovering title to or possession of the property.

Any payments of cash made by the transferee against the purchase price of property transferred shall, upon a forfeiture of title to the property for breach of condition, be forfeited.

(7) With respect to off-site property, in the event of noncompliance with any of the terms and conditions of the transfer, the unearned public benefit allowance shall, at the option of the Department, become immediately due and payable or, if the property or any portion thereof is sold, leased, or otherwise disposed of without authorization from the Department, such sale, lease or sublease, or other disposal shall be for the benefit and account of the United States and the United States shall be entitled to the proceeds. In the event the transferee fails to remove the property or any portion thereof within the time specified, then in addition to the rights reserved above, at the option of the Department, all right, title, and interest in and to such unremoved property shall be retransferred to other eligible applicants or shall be forfeited to the United States.

(8) With respect only to on-site property which has been declared excess by the Department of Defense, such declaration having included a statement indicating the property has a known potential for use during a national emergency, the Department shall reserve the right during any period of emergency declared by the President of the United States or by the Congress of the United States to the full and unrestricted use by the Government of the surplus real property, or of any portion thereof, disposed of in accordance with the provisions of this part. Such use may be either exclusive or nonexclusive. Prior to the expiration or termination of the period of restricted use by the transferee, the Government will not be obligated to pay rent or any other fees or charges during the period of emergency, except that the Government will:

(i) Bear the entire cost of maintenance of such portion of the property used by it exclusively or over which it may have exclusive possession or control;

(ii) Pay the fair share, commensurate with the use of the cost of maintenance of such surplus real property as it may use nonexclusively or over which it may have nonexclusive possession or control;

(iii) Pay a fair rental for the use of improvements or additions to the surplus real property made by the purchaser or lessee without Government aid; and

(iv) Be responsible for any damage to the surplus real property caused by its use, reasonable wear and tear, the common enemy and acts of God excepted. Subsequent to the expiration or termination of the period of restricted use, the obligations of the Government will be as set forth in the preceding sentence and, in addition, the Government shall be obligated to pay a fair rental for all or any portion of the conveyed premises which it uses.

(9) The restrictions set forth in subparagraphs (1) through (7) will extend for thirty (30) years for land with or without improvements; and for facilities being acquired separately from land whether they are for use on-site or off-site, the period of limitations on the use of the structures will be equal to their estimated economic life. The restrictions set forth in subparagraphs (1) through (7) will extend for the entire initial lease period and for any renewal periods for property leased from the Department.

(d) Transferees, by obtaining the consent of the Department, may abrogate the restrictions set forth in paragraph (c) for all or any portion of the property upon payment in cash to the Department of an amount equal to the then current fair market value of the property to be released, multiplied by the public benefit allowance granted at the time of conveyance, divided by the total number of months of the period of restriction set forth in the conveyance document and multiplied by the number of months that remain in the period of restriction as determined by the Department. For purposes of abrogation payment computation, the current fair market value shall not include the value of any improvements placed on the property by the transferee.

(e) Related personal property will be transferred or leased as a part of the realty and in accordance with real property procedures. It will be subject to the same public benefit allowance granted for the real property. Where related personal property is involved in an on-site transfer, the related personal property may be transferred by a bill of sale imposing restrictions for a period not to exceed five years from the date of transfer, other terms and conditions to be the same as, and made a part of, the real property transaction.

§ 12.10 Compliance with the National Environmental Policy Act of 1969 and other related acts (environmental impact).

(a) The Department will, prior to making a final decision to convey or lease, or to amend, reform, or grant an approval or release with respect to a previous conveyance or lease of, surplus real property for public health purposes, complete an environmental assessment of the proposed transaction in keeping with applicable provisions of the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, the National Archeological Data Preservation Act, and other related acts. No permit to use surplus real property shall allow the permittee to make, or cause to be made, any irreversible change in the condition of said property, and no use permit shall be employed for the purpose of delaying or avoiding compliance with the requirements of these Acts.

(b) Applicants shall be required to provide such information as the Department deems necessary to make an assessment of the impact of the proposed Federal action on the human environment. Materials contained in the applicant's official request, responses to a standard questionnaire prescribed by the Director of the Office of Federal Property Assistance, as well as other relevant information, will be used by the Department in making said assessment.

(c) If the assessment reveals (1) That the proposed Federal action involves properties of historical significance which are listed, or eligible for listing, in the National Register of Historic Places, or (2) that a more than insignificant impact on the human environment is reasonably foreseeable as a result of the proposed action, or (3) that the proposed Federal action could result in irreparable loss or destruction of archeologically significant items or data, the Department will, except as provided for in paragraph (d) below, prepare and distribute, or cause to be prepared or distributed, such notices and statements and obtain such approvals as are required by the above cited Acts.

(d) If a proposed action involves other Federal agencies in a sequence of actions, or a group of actions, directly related to each other because of their functional interdependence, the Department may enter into and support a lead agency agreement to designate a single lead agency which will assume primary responsibility for coordinating the assessment of environmental effects of proposed Federal actions, preparing and distributing such notices and statements, or obtaining such approvals, as are required by the above cited Acts. The procedures of the designated lead agency will be utilized in conducting the environmental assessment. In the event of disagreement between the Department and another Federal agency, the Department will reserve the right to abrogate its lead agency agreement with the other Federal Agency.

§ 12.11 Special terms and conditions.

(a) Applicants will be required to pay all external administrative costs which will include, but not be limited to, taxes, surveys, appraisals, inventory costs, legal fees, title search, certificate or abstract expenses, decontamination costs, moving costs, closing fees in connection with the transaction and service charges, if any, made by State Agencies for Federal Property Assistance under the terms of a cooperative agreement with the Department.

(b) In the case of off-site property, applicants will be required to post performance bonds, make performance guarantee deposits, or give such other assurances as may be required by the Department or the holding agency to insure adequate site clearance and to pay service charges, if any, made by State Agencies for Federal Property Assistance under the terms of a cooperative agreement with the Department.

(c) Whenever negotiations are undertaken for disposal to private nonprofit public health organizations of any surplus real property which cost the Government $1 million or more, the Department will give notice to the Attorney General of the United States of the proposed disposal and the terms and conditions thereof. The applicant shall furnish to the Department such information and documents as the Attorney General may determine to be appropriate or necessary to enable him to give the advice as provided for by section 207 of the Act.

(d) Where an applicant proposes to acquire or lease and use in place improvements located on land which the Government does not own, he shall be required, before the transfer is consummated, to obtain a right to use the land commensurate with the duration of the restrictions applicable to the improvements, or the term of the lease. The applicant will be required to assume, or obtain release of, the Government's obligations respecting the land including but not limited to obligations relating to restoration, waste, and rent. At the option of the Department, the applicant may be required to post a bond to indemnify the Government against such obligations.

(e) The Department may require the inclusion in the transfer or lease document of any other provision deemed desirable or necessary.

(f) Where an eligible applicant for an on-site transfer proposes to construct new, or rehabilitate old, facilities, the financing of which must be accomplished through issuance of revenue bonds having terms inconsistent with the terms and conditions of transfer prescribed in § 12.9 (c), (d), and (e) of this chapter, the Department may, in its discretion, impose such alternate terms and conditions of transfer in lieu thereof as may be appropriate to assure utilization of the property for public health purposes.

§ 12.12 Utilization.

(a) Where property or any portion thereof is not being used for the purposes for which transferred, the transferee will be required at the direction of the Department:

(1) To place the property into immediate use for an approved purpose;

(2) To retransfer such property to such other public health user as the Department may direct;

(3) To sell such property for the benefit and account of the United States;

(4) To return title to such property to the United States or to relinquish any leasehold interest therein;

(5) To abrogate the conditions and restrictions of the transfer, as set forth in § 12.9(d) of this chapter, except that, where property has never been placed in use for the purposes for which transferred, abrogation will not be permitted except under extenuating circumstances; or

(6) To make payments as provided for in § 12.3(c) of this chapter.

(b) Where the transferee or lessee desires to place the property in temporary use for a purpose other than that for which the property was transferred or leased, approval from the Department must be obtained, and will be conditioned upon such terms as the Department may impose.

§ 12.13 Form of conveyance.

(a) Transfers or leases of surplus real property will be on forms approved by the Office of General Counsel of the Department and will include such of the disposal or lease terms and conditions set forth in this part and such other terms and conditions as the Office of General Counsel may deem appropriate or necessary.

(b) Transfers of on-site property will normally be by quitclaim deed without warranty of title.

§ 12.14 Compliance inspections and reports.

The Department will make or have made such compliance inspections as are necessary and will require of the transferee or lessee such compliance reports and actions as are deemed necessary.

§ 12.15 Reports to Congress.

The Secretary will make such reports of real property disposal activities as are required by section 203 of the Act and such other reports as may be required by law.

EXHIBIT A—PUBLIC BENEFIT ALLOWANCE FOR TRANSFER OF REAL PROPERTY FOR HEALTH PURPOSES [1]

Classification	Percent allowed											
	Organization allowances							Utilization allowances				Maximum public benefit allowance
	Basic public benefit allowance	Tax support	Accreditation	Hardship	Unmet needs			Integrated research program	Outpatient services	Public services	Training program	
					10 to 25%	26 to 50%	51 to 100%					
Hospitals	50	20	20	10	10	20	30	10	10	10	10	100
Clinics	50	20	20	10	10	20	30	....	....	....	....	100
Nursing Homes	50	20	20	10	10	20	30	....	....	....	10	100
Public Health Administration	[2] 100	....	....	....	....	....	....	....	....	....	....	[2] 100
Public Refuse Disposal and Water Systems	[2] 100	....	....	....	....	....	....	....	....	....	....	[2] 100
Research	[2] 100	....	....	....	....	....	....	....	....	....	....	[2] 100
Rehabilitation Facility	50	20	20	10	10	20	30	10	10	10	10	100
Special Services	50	20	20	10	10	20	30	....	....	10	....	100

[1] This public benefit allowance applies only to surplus real property being sold for on-site use. When surplus real property is to be moved from the site, a basic public benefit allowance of 100% will be granted.

[2] Applicable when this is the primary use to be made of the property. The public benefit allowance for the overall health program is applicable when such facilities are conveyed as a minor component of other facilities.

PART 15—RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES

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AUTHORITY: Sec. 213, 84 Stat. 1900, 42 U.S.C. 4633.

SOURCE: 38 FR 8492, Apr. 2, 1973, unless otherwise noted.

Subpart A—General

§ 15.1 Purpose.

The purpose of the regulations in this part is to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) and the guidelines therefor in OMB Circular No. A-103, of May 1, 1972.

§ 15.2 Background

The Act provides a uniform policy for the fair and equitable treatment of owners and tenants of real property who are displaced by Federal or federally assisted programs or projects or whose real property or interests in real property is taken for or as a direct result of such programs or projects. The need for such a uniform policy arises from the growing impact on such persons of such programs and projects as they evolve to meet the public needs of a growing, and increasingly urban, population. Title II of the Act provides for a program of relocation payments, of relocation assistance (including advisory services), of assurances that prior to the displacement of persons comparable quality decent, safe, and sanitary replacement housing will be available for them, and of economic adjustments and other assistance to owners and tenants displaced from their homes, businesses, or farm operations. Title III of the Act provides a uniform policy with respect to real property acquisitions for or as a direct result of Federal or federally assisted programs or projects.

§ 15.3 Effective date.

Relocation payments and assistance provided for by title II of the Act are to be made to all persons otherwise eligible who are displaced on or after January 2, 1971; the real property acquisition policies provided by title III of the Act apply to real property acquisitions on or after January 2, 1971. Until July 1, 1972, the provisions of both those titles of the Act applied to State programs and projects receiving Federal financial assistance, to the extent that the State was under its laws able to comply with those titles. On July 2, 1972, the provisions of title II and the provisions of sections 303 and 304 of title III, relating to incidental expenses and litigation expenses in connection with real property acquisitions, became fully applicable to State programs and projects receiving Federal financial assistance; and the provisions of sections 301 and 302 of the Act, relating to real property acquisition policies and to practices relating to the acquisition of buildings, structures, and improvements, continue to guide State programs and projects receiving Federal financial assistance, but only to the greatest extent practicable under State law.

§ 15.4 Definitions.

(a) The "Act" means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), approved January 2, 1971 (42 U.S.C. 4601-4655).

(b) "Actually occupied" means openly and visibly occupied by the owner or tenant or his immediate family more than temporarily or casually, but does not call for constant personal presence nor foreclose temporary absence occasioned by some casualty or for business or pleasure.

(c) "Business" means any lawful activity, except a farm operation, including an activity by a nonprofit organization, conducted primarily: (1) For the purchase, sale, lease, or rental of personal or real property or for the manufacturing, processing, or marketing of products, commodities, or other items of personal property, (2) for the sale of services to the public, or (3) but solely for purposes of entitlement to the cost of actual moving and related expenses, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, other personal property, or services by the erection and maintenance of outdoor advertising displays, whether or not such displays are located on the premises on which any of such activities are conducted. The term includes only those activities which are conducted regularly on a bona fide basis, and does not include activities conducted as avocations.

(d) "The Department" means the U.S. Department of Health and Human Services or one of its constituent agencies.

(e) "Displaced person" means any person who moves from real property, or moves his personal property from real property, as a result of the acquisition, in whole or in part, of such real property, or as a result of the written order of the acquiring agency to vacate such real property for a program or project undertaken by the Department, or by a State agency for or as a direct result of a program or project for which it receives Federal financial assistance from the Department. It also means, but solely for purposes of entitlement to the actual cost of moving and related expenses or to a sum in lieu thereof or of entitlement to relocation assistance advisory services, such a person who so moves from other real property, or so moves his personal property from other real property, as a result of the acquisition for or as a direct result of such a program or project of, or the written order of the acquiring agency to vacate, such other real property on which such person conducts a business or farm operation.

(f) "Displacing agency" means the Department when it acquires real property or gives a written notice to a person to vacate real property for a program or project undertaken by the Department, or a State agency so acting for or as a direct result of a program or project for which financial assistance is provided by the Department and which results in the displacement of a person.

(g) "Dwelling" means the structure constituting the place of permanent, or customary and usual, abode of a person. It includes a single-family dwelling; a multifamily building; a condominium or cooperative housing project; or a mobile home or other residential unit.

(h) "Family" means two or more individuals who are related by blood, adoption, marriage, or guardianship, or one of whom stands in loco parentis to another and who live together as a family unit. However, individuals who live together as a family unit as if they were so related may be regarded as a single family.

(i) "Farm operation" means any activity conducted solely or primarily for the production of one or more raw agricultural products or commodities, including timber, for sale or home use, and customarily producing such agricultural products or commodities in quantities sufficient to be capable of contributing materially to the operator's support.

(j) "Federal financial assistance" means a grant, loan, or contribution provided by the Department, whether in the form of a grant, contract, or agreement and without regard to whether the financial assistance applies to the acquisition of real property required for, or as a direct result of, the project being assisted, but does not mean any annual payment or capital loan to the District of Columbia or any Federal guarantee or insurance.

(k) "Financial means" means the ability of a displaced person to afford the rental or price of a replacement dwelling determined to be available for rent or sale to such a displaced person. For this purpose, the rental or housing cost (e.g., mortgage payments, insurance for the dwelling unit, property taxes, and other related recurring expenses) which the displaced person will be required to pay for the replacement dwelling should not normally exceed the fair rental or value of the acquired dwelling by more than 20 percent and, for purposes of housing referrals, the rental value should not, except in unusual circumstances, exceed 25 percent of the gross income of the displaced person including supplemental payments made by public agencies.

(l) "Initiation of negotiations" means the first personal contact by or on behalf of the displacing agency with the owner of real property or with his representative at which the price of the real property is discussed.

(m) "Mortgage" means a deed of trust or lien commonly used in the State in which the real property is located to secure advances on, or the unpaid purchase price of, real property, together with the credit instruments, if any, secured thereby.

(n) "Nonprofit organization" means a partnership, corporation, or association no part of the profits of which inures, or is intended to inure, to the benefit of any private shareholder or individual.

(o) "Owner" means a person who holds a fee simple title, a life estate, or a 99-year lease in real property, or an interest in a cooperative project which includes the right of occupancy, or who is possessed of such other proprietary interest in real property as, in the judgment of the Secretary, warrants being treated as ownership. In the case of a person who has succeeded to any of the foregoing interests in real property by devise, bequest, inheritance, or operation of law, the tenure of the succeeding owner includes the tenure of the preceding owner in relation to ownership but not in relation to occupancy.

(p) "Person" means any individual, partnership, corporation, or association.

(q) "Secretary" means the U.S. Secretary of Health and Human Services.

(r) "State" means any of the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, the Trust Territory of the Pacific Islands, or any political subdivision thereof.

(s) "State agency" means any department, agency, or instrumentality of a State or any department, agency, or instrumentality of two or more States, and includes a State itself.

§ 15.5 Applicability.

(a) This part applies, in relation to title II of the Act, to all direct projects of the Department which have resulted in or will result in the displacement of persons or, in relation to title III of the Act, which have resulted in or will result in the acquisition of real property.

(b) This part applies, in relation to title II of the Act, to all projects of State agencies receiving financial assistance in whole or in part from the Department which projects have resulted in or will result in the displacement of persons or, in relation to title III of the Act, which have resulted in or will result in the acquisition of real property. For this purpose, it is immaterial whether Federal funds are used by the State agency for the acquisition of such real property as is required for, or as a direct result of, the project.

§ 15.6 Categorical exceptions.

This part does not apply to federally assisted projects of those entities, such as private entities, that do not meet the definition of a State agency in § 15.4(s), except when such an entity is acting as an agent or contractor of a State agency, or of the Department, in the discharge of its responsibilities.

Subpart B—Assurances From State Agencies as a Condition Precedent to Participation in Federally Assisted Programs

§ 15.10 State agency program assurances.

(a) The Department will not approve any grant to, or contract or agreement with, a State agency under a program for which financial assistance will be available from the Department to pay all or part of the cost and which will result in the acquisition of real property or an interest therein and in the displacement on or after January 2, 1971, of any person, until satisfactory assurances are received from that State agency that fair and reasonable relocation payments and assistance will be provided by the displacing agency under title II of the Act and this part; that relocation assistance programs offering the advisory services described in section 205 of the Act and this part will be provided to such displaced persons; and in connection with individual projects that, within a reasonable period of time prior to the displacement of persons, decent, safe, and sanitary dwellings will be available, as provided for in § 15.15 to persons so displaced by that project.

(b) In connection with programs which result in the acquisition of real property, whether or not involving the displacement of persons, the Department will also require, as a condition precedent to providing financial assistance, assurances that expenses incidental to the transfer of title, and litigation expenses in the event the real property is not in fact so acquired, will be paid as provided for in sections 303 and 304 of the Act, and that the State agency will be guided, to the greatest extent practicable under State law, by the real property acquisition policies prescribed by section 301 of the Act and by the practices relating to the acquisition of buildings, structures, and improvements prescribed by section 302 of the Act.

(c) The assurances required by this section will be required even though the financial assistance by the Department does not extend to the acquisition of the real property, whether or not such real property is furnished by the State agency as a required contribution incident to a project receiving financial assistance from the Department.

Subpart C—Assurance of Adequate Replacement Housing Prior to Displacement By a Project

§ 15.15 Project assurance of housing availability.

(a) The Department will not proceed with any phase of a project, or authorize a State agency to proceed with any phase of a project, which will result in the displacement of any person until the Department has determined, or received from the displacing State agency (in addition to the assurances called for by § 15.10) a relocation plan containing satisfactory assurances that within a reasonable period of time prior to the displacement of such persons by that project there will be, on a basis consistent with the requirements of title VIII, Fair Housing, of Public Law 90-284 (42 U.S.C. Ch. 45), available in areas not generally less desirable in regard to public utilities and public and commercial facilities, such as schools, stores, and public transportation, and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings (as described in paragraph (d) of this section) equal to the number of, and available to, those of such displaced persons who are expected to require replacement dwellings and reasonably accessible to their places of employment. A State agency that is not required to obtain an authorization from the Department with respect to individual projects must nevertheless submit a relocation plan to the Department for approval unless the State agency determines before the project is carried out that the project will not cause the dislocation of persons.

(b) An assurance or determination called for by paragraph (a) of this section must be based upon a current survey and analysis of available replacement housing made by or on behalf of the displacing agency. Such a survey and analysis must take into account competing demands for such housing.

(c) In certain extraordinary situations, such as where immediate possession of real property is of crucial importance, the Secretary may waive or modify the requirements of paragraph (a) of this section. A request for such a waiver or modification must be supported by a documentation sufficiently substantial to show the need for such a waiver or modification.

(d) A decent, safe, and sanitary dwelling is one which is in sound, clean, and weathertight condition and which meets the applicable requirements of State and local building, plumbing, electrical, housing and occupancy codes or regulations. The following criteria, subject to adjustment for unusual circumstances or for unique geographical areas, will be applied in determining whether a dwelling is decent, safe, and sanitary:

(1) If it is a housekeeping unit it must include a kitchen with a fully usable sink; a cooking stove, or connections for one; a separate and complete bathroom; hot and cold running water in both the kitchen and bathroom; an adequate and safe wiring system for lighting and other electrical services; and such heating facilities as are required by local housing codes or are called for by climatic conditions.

(2) If it is a nonhousekeeping unit it must meet local code standards for boarding houses, hotels, or other congregate living quarters. If local codes do not include requirements relating to space and sanitary facilities, standards to be applied in that regard are subject to the approval of the Secretary.

(3) Occupancy standards must comply with local housing codes or, in the absence of such local housing codes, the requirements of the Secretary in that regard.

(e) Where local housing codes do not exist or do not contain adequate minimum standards, the Secretary will prescribe the minimum standards to be applied.

§ 15.16 Housing provided as a last resort.

The Secretary will provide for replacement housing for Federal projects, or take or approve action by a State agency to develop replacement housing for projects financially assisted by the Department. In taking or approving such action, the Secretary will be guided by the criteria and procedures prescribed by the Secretary of Housing and Urban Development and published at 37 FR 3633 on February 18, 1972 (24 CFR Part 43, Subpart A).

§ 15.17 Loans for planning and preliminary expenses.

Section 215 of the Act authorizes the making of loans, in the nature of seed money loans, for planning and obtaining federally insured mortgage financing to stimulate the construction or rehabilitation of sale and rental housing to meet the needs of displaced persons. Such loans may be made to nonprofit, limited dividend, or cooperative organizations, or to public bodies, for not more than 80 percent of the reasonable expenses, prior to construction, for activities such as preliminary surveys and analyses of market needs, preliminary site engineering and architectural fees, site title searches and appraisals, application and mortgage commitment fees and charges, legal fees, and construction loan fees and discounts. Loans to nonprofit organizations will be interest free. The making of such loans is subject to the criteria and procedures prescribed by the Secretary of Housing and Urban Development and published at 37 FR 14768 on July 25, 1972 (24 CFR Part 43, Subpart B).

Subpart D—Actual Moving and Related Expenses and Losses

§ 15.21 Eligibility.

All displaced persons (including one who conducted a business or farm operation on acquired property) is eligible for payment for his moving and related expenses in moving from real property acquired by or on behalf of a displacing agency. A person who conducts a business or farm operation on acquired property on which he lives or on other acquired property may be eligible for the moving and related expenses of himself and his family, and for his personal property, including personal property used in such a business or farm operation.

§ 15.22 Application.

(a) A displaced person eligible for payments under title II of the Act shall be entitled to payments or assistance under this subpart only upon application therefor, with necessary supporting documentation, within 18 months from the date of his displacement or from the date on which the displacing agency makes final payment for the real property, whichever is later. The head of the displacing agency may extend that period upon a proper showing of good cause.

(b) Payments to a displaced person under title II of the Act shall be made promptly after he moves. Such payments may be made in advance of such a move in a hardship case justifying such an advance payment even though full documentation supporting the application has not been filed.

§ 15.23 Allowable moving and related expenses.

(a) Subject to the limitations in paragraph (b) of this section, the following expenses are allowable as moving and related expenses:

(1) The cost of transportation of individuals, families, and personal property to a replacement site not more than 50 miles distant except when the Secretary determines that relocation beyond 50 miles is justified under the circumstances.

(2) The cost of packing and crating, and of unpacking and uncrating, personal property.

(3) The cost of advertising for packing and crating, unpacking and uncrating, and transportation services when the Secretary determines that such advertising is necessary or desirable.

(4) The cost of storage of personal property for a period of time when the Secretary determines that storage for such a period, generally not in excess of 12 months, is necessary or desirable in connection with the relocation.

(5) The cost of premiums on insurance covering the loss of or damage to personal property while in transit or in storage authorized pursuant to paragraph (a)(4) of this section.

(6) The value of personal property lost, stolen, or damaged (other than through the fault or negligence of the

displaced person or his agent or employee) in the process of moving or in storage authorized pursuant to paragraph (a)(4) of this section, if insurance to cover such a loss was not reasonably available.

(7) The cost of removal, installation, and reestablishment of, and the reconnection of utilities for, machinery, equipment, appliances, and other items not acquired as real property, including such modifications thereof as is deemed necessary by the Secretary. Prior to the payment for any such costs in relation to such property, the displaced person must agree in writing that such property is personalty and that the displacing agency is released from any liability for payment for the value of such property.

(8) Such other related expenses as the Secretary determines to be reasonable under the circumstances.

(b) When the displaced person accomplishes the move by himself or by the use of his family or employees, the amount of allowable expenses will not exceed the estimated commercial cost of such a move.

§ 15.24 Direct losses incurred in moving or discontinuing a business or farm operation.

(a) If a displaced person does not move personal property used in a business or farm operation but has made a bona fide effort to sell such personal property, he is entitled to payment for the loss of such personal property, and he may be reimbursed for expenses reasonably incurred in such a selling effort.

(b) If a business or farm operation is discontinued, a displaced person is entitled, with respect to personal property which was used in connection therewith, to a payment for what would have been its fair market value for its continued use at its location prior to displacement minus the net proceeds from its sale or, if abandoned after a bona fide effort to sell, to the estimated cost of moving it 50 miles, whichever is less. Payments to a displaced person shall not be offset by the cost to the displacing agency of removing such abandoned property.

(c) If a business or farm operation is reestablished, a displaced person is entitled, with respect to personal property which was used in connection therewith but which is not moved but rather is sold and promptly replaced by a comparable item, to a payment for its replacement cost minus the net proceeds from its sale or the estimated cost of moving it 50 miles, whichever is less.

(d) If personal property used in a business or farm operation to be moved is of high bulk and low value and the cost of moving it would, in the judgment of the Secretary, be disproportionate to its value, the allowable expense of moving such personal property will not exceed the cost of replacing it at the relocated premises with comparable personal property available on the market minus the estimated net amount that would have been received for such personal property on liquidation. This provision is applicable to junkyard items and to stockpiled sand, gravel, minerals, metals, or similar items of personal property.

(e) If the cost of moving or relocating an outdoor advertising display is determined by the displacing agency to be equal to or in excess of the inplace value of the display, consideration should be given to acquiring such a display as a part of the real property except when such an acquisition is prohibited by law.

§ 15.25 Allowable expenses in connection with searching for a replacement location for a business or farm operation.

(a) The following expenses are allowable under this subpart in connection with the searching for a replacement location for a business or farm operation:

(1) Actual travel costs but not in excess of 10 cents a mile.

(2) Cost of meals and lodging away from home.

(3) The value of time spent in searching for a replacement location for a business or farm operation, at the rate of the displaced person's salary or earnings but not in excess of $10 an hour.

(4) In the discretion of the displacing agency, such brokerage, realtor, or other professional fees in connection with relocating a business or farm op-

eration in the area as is customary under the circumstances.

(b) The total amount allowable to a displaced person under this section will not exceed $500 unless the Secretary determines that a larger amount is justified under the circumstances.

§ 15.26 Nonallowable moving expenses and losses.

The following expenses are not allowable under this subpart in connection with the relocation of a business or farm operation:

(a) Additional expenses incurred because of living at a new location.

(b) The cost of moving structures or other improvements to real property as to which the displaced person reserved ownership, except as otherwise provided for by the Act.

(c) The cost of improvements to the replacement site, except as provided for in § 15.23.

(d) Interest on loans to cover moving and related expenses.

(e) Loss of goodwill.

(f) Loss of profits.

(g) Added expenses incurred because of a loss of trained employees.

(h) Expenses or losses resulting from personal injury.

(i) The cost of preparing applications for moving and related expenses and of preparing supporting documentation.

(j) The cost of the modification of personal property to adapt it to the replacement site, except when required by law.

(k) The cost of searching for a replacement dwelling.

(l) The cost of establishing a different or larger business or farm operation to the extent that such a cost exceeds the estimated cost of reestablishing the business or farm operation being discontinued.

Subpart E—Payments in Lieu of Actual Moving and Related Expenses

§ 15.30 Use of schedules in connection with displacement from dwelling.

A person displaced from a dwelling may at his option receive, in lieu of actual moving and related expenses for himself and his family under Subpart D of this part, a moving expense allowance, not in excess of $300, determined according to schedules established by the highway department of the State in which the acquired dwelling is located and approved by the Federal Highway Administrator or, in the absence of such a highway department schedule, according to schedules established by the Federal Highway Administrator, plus a dislocation allowance of $200.

§ 15.31 Fixed payment for person displaced from his place of business or farm operation.

(a) A person displaced from his place of business or farm operation may, at his option, receive, in lieu of actual moving and related expenses in that regard under Subpart D of this part but in addition to such payments as he may be entitled to for himself and his family under Subpart D of this part or § 15.30, a fixed payment in the amount of the average annual net earning before Federal, State, and local income taxes of his bona fide business or farm operation during the 2 taxable years immediately preceding the taxable year in which the business or farm operation is moved from the acquired real property or during such other period as the head of the displacing agency determines to be more equitable for establishing such average annual net earnings, including any compensation paid by the business or farm operation to the owner or his spouse or dependents during such a base period, but not less than $2,500 nor more than $10,000 in respect of any bona fide business or farm operation, except that no payment will be made under this section with respect to a business conducted primarily for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, other personal property, or services by the erection and maintenance of outdoor advertising displays.

(b) No payment may be made pursuant to this section in respect of a business unless the Secretary determines (1) that the business cannot be relocated without a substantial loss of existing patronage and (2) that the business is not a part of an enterprise with at least one other establishment which is engaged in the same or a similar business and which is not being acquired.

(c) The determination of whether there will be a substantial loss of existing patronage is to be made, except as provided for in paragraph (d) of this section, by the displacing agency after considering all pertinent circumstances, including but not limited to the following factors:

(1) The type of business conducted by the displaced person.

(2) The nature of the clientele of the displaced person.

(3) The availability of property suitable for use as a new location on which to conduct the business.

(4) The relative importance to the business of the present location and such new locations as are available.

(d) The determinations of whether there will be a substantial loss of existing patronage of an activity conducted by a nonprofit organization and of whether the activity is a part of an enterprise with at least one other establishment which is engaged in the same or a similar activity and which is not being acquired will be made by the Secretary. For this purpose, the term "existing patronage" includes the persons, community, or clientele served or affected by the activities of the nonprofit organization.

(e) A payment will be made under this section with respect to the acquisition of a part of the property used by a person for a farm operation only when the displacing agency determines that the acquired property was in fact used for a farm operation before the taking and that the remaining property cannot be expected to be so used for a farm operation and continue to contribute substantially to the operator's support.

Subpart F—Replacement Housing Payments

§ 15.35 Payments for replacement housing costs to homeowners.

(a) A person displaced from a dwelling actually owned and occupied by him for at least 180 days prior to the initiation of negotiations for the acquisition of that dwelling is entitled, in addition to entitlement to other payments under this part, to payment for the additional cost, if reasonable, of acquiring a comparable replacement dwelling which is decent, safe, and sanitary and which he purchases and occupies within 1 year from the date he received final payment for the dwelling from which he was displaced or from the date on which he moved therefrom, whichever is later, as well as payment for additional interest costs as provided for in § 15.37.

(b) A comparable replacement dwelling is a dwelling that is functionally equivalent to, and substantially the same as, the acquired dwelling, not excluding for this purpose newly constructed housing. Each aspect of the dwellings need not be individually compared as long as all the requirements of paragraph (c) of this section are met.

(c) The additional cost of a replacement dwelling will not be regarded as unreasonable if that additional cost results from the need for acquiring a dwelling which is decent, safe, and sanitary, which is adequate to accommodate the displaced person and his family, which is located in an area not generally less desirable in respect of neighborhood conditions such as municipal services and other environmental factors, public utilities, and public and commercial facilities, which is reasonably accessible to the displaced person's place of employment or potential place of employment, which is within the financial means of the displaced person, and which is available on the private market. If such housing is not available, the displacing agency may, for purposes of this subpart and for making housing referrals, consider housing exceeding the other basic criteria.

§ 15.36 Limitation on payments for replacement housing costs.

(a) The amount of a payment for the additional cost of a replacement dwelling to a displaced dwelling owner will not exceed the difference between the amount paid by the displacing agency for the acquired dwelling and the amount paid by the displaced dwelling owner for a comparable dwelling not in excess of a reasonable amount as determined by the schedule method described in paragraph (b) of this section, or by the comparative method described in paragraph (c) of this section, or by another method approved pursuant to paragraph (d) of this section, whichever is the least, and in no event will exceed $15,000.

(b) *Schedule method.* The Secretary may establish a schedule of reasonable acquisition costs of comparable replacement dwellings for the various types of dwellings to be acquired in the community or area involved and meeting the conditions prescribed in § 15.15(d) as well as being open to all persons regardless of race, color, religion, or national origin consistent with the requirements of title VIII, Fair Housing, of Public Law 90-284 (42 U.S.C. ch. 45).

(c) *Comparative method.* The Secretary may determine the cost of a comparable replacement dwelling on the basis of the asking price, adjusted to reflect market experiences, of a dwelling or dwellings most representative of the dwelling acquired by the displacing agency and meeting the conditions prescribed in § 15.15(d) and paragraph (b) of this section. A single dwelling unit will be used for comparison purposes only when additional comparable dwellings are not available.

(d) *Alternative method.* The head of the displacing agency may develop criteria for computing the cost of replacement housing when the use of neither of the methods described in paragraph (b) or (c) of this section is feasible. Such an alternative method will be subject to the approval of the Secretary.

(e) For purposes of this section, the cost of a replacement dwelling includes legal, closing, and related costs such as: (1) The cost of a title search, the preparation of conveyance instruments, notarial fees, surveys, the preparation of plats, and charges incident to recordation, (2) lender's, FHA, or VA appraisal fees, (3) FHA application fee, (4) the cost of a certification of structural soundness when required by the lender, FHA, or VA, (5) the cost of a credit report, (6) the cost of a title policy or abstract of title, (7) an escrow agent's fee, and (8) the cost of revenue stamps and of sale or transfer taxes.

(f) For purposes of this section, the cost of a replacement dwelling does not include a fee, cost, charge, or expense determined to be a part of the finance charge under title I, the Truth in Lending Act, of Public Law 90-321, and Regulation "Z" (12 CFR Part 226) issued pursuant thereto by the Board of Governors of the Federal Reserve System.

§ 15.37 Payments for additional interest costs incurred.

(a) In addition to entitlement to the payments provided for by § 15.35, a person displaced from a dwelling actually owned and occupied by him shall be entitled to compensation for any increased interest costs with respect to the amount that is refinanced if the dwelling acquired by the displacing agency was encumbered by a bona fide mortgage for not less than 180 days prior to the initiation of negotiations for the acquisition of that dwelling.

(b) A payment under this section shall be equal to the difference between the discounted present value of the remaining interest payments that were called for by the mortgage on the acquired dwelling and the discounted present value of the interest payments, called for with respect to that amount of principal of the mortgage on the replacement dwelling that is equal to the unpaid principal of the mortgage on the acquired dwelling for the length of its remaining term. Such a payment shall also cover the cost of points paid with respect to the mortgage on the replacement dwelling and the cost of those finance charges that are referred to in § 15.36(f).

(c) For purposes of paragraph (b) of this section, discounted present value shall be calculated on the basis of the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located.

§ 15.38 Mortgage insurance.

Section 203(b) of the Act authorizes the head of any Federal agency administering a Federal mortgage insurance program, upon application by a mortgagee, to insure any mortgage (including advances during construction) executed by a person assisted under that section on a comparable replacement dwelling, which mortgage is eligible for such insurance without regard to any eligibility requirements otherwise applicable with respect to age, physical condition, or other personal characteristics of mortgagors, and to make commitments for the insurance of such a mortgage prior to the date of execution of the mortgage.

§ 15.39 Payments to tenants and others for the rental of replacement dwellings.

(a) A displaced tenant of a dwelling which he actually and lawfully occupied for a period of not less than 90 days prior to the initiation of negotiations for the acquisition of that dwelling by the Department or by a State agency as a direct result of a program financially assisted by the Department may be eligible for a payment under this section if he rents rather than purchases a decent, safe, and sanitary replacement dwelling.

(b) A displaced owner of a dwelling which he actually owned and occupied for a period of not less than 90 days prior to the initiation of negotiations for the acquisition of that dwelling by the Department or by a State agency as a direct result of a program financially assisted by the Department or which he so owned and occupied for a period of more than 180 days but as to which he has not purchased and occupied a decent, safe, and sanitary replacement dwelling may be eligible for a rental payment under this section.

(c) The amount of the rental payment under this section, which will not exceed $4,000 for a displaced person, will be based on the rental agreed to by the displaced person subject to a limitation determined either by the schedule method described in paragraph (d) of this section or by the comparative method described in paragraph (e) of this section.

(d) The Secretary will establish a rental schedule for renting comparable replacement dwellings (or one or more dwellings most representative of the dwelling acquired) which are available in the private market for the various types of dwellings to be acquired, based upon a current survey and analysis of the market for each type of dwelling required. Payment pursuant to such a schedule will be computed by determining the amount necessary to rent a comparable replacement dwelling for 4 years (based on the average monthly rental from the schedule) and by subtracting from that amount an amount equal to 48 times the average monthly rental, if reasonable, paid by the displaced person for the acquired dwelling over the 3 months (or more if necessary to determine a representative figure) immediately preceding the initiation of negotiations for the acquisition of that dwelling. If the average rental was unreasonably high or if the displaced person was the owner, the subtraction will be based on a rental charge that is determined would have been reasonable for the acquired dwelling. The amount subtracted will include any rent supplements supplied by others except when such a supplement is to be discontinued upon vacation of the property.

(e) When the method described in paragraph (d) of this section cannot be feasibly applied, the Secretary will apply such criteria as are reasonable and appropriate for computing the rental payment.

(f) A payment of $500 or less for rental will be made in a lump sum. All such payments aggregating in excess of $500 will be paid in semi-annual installments of $500 each except that the final installment shall be for that amount, not in excess of $500, necessary to complete the payments. Prior to making the initial payment, the displacing agency must have determined that the displaced person is occupying a decent, safe, and sanitary dwelling. The manner of making such payments may be modified to accommodate a reasonable request of the displaced person reflecting his wishes in that regard.

§ 15.40 Payments to tenants and others for the purchase of replacement dwellings.

(a) A displaced tenant of a dwelling which he actually and lawfully occupied for a period of not less than 90 days prior to the initiation of negotiations for the acquisition of that dwelling by the Department or by a State agency as a direct result of a program financially assisted by the Department may be eligible for a payment sufficient for him to make a downpayment on the purchase of a decent, safe, and sanitary dwelling if he elects to purchase rather than to rent such a dwelling.

(b) A displaced owner of a dwelling which he actually owned and occupied for a period of not less than 90 days, but not more than 180 days, prior to the initiation of negotiations for the acquisition of that dwelling by the Department or by a State agency as a direct result of a program financially assisted by the Department may be eligible for a payment sufficient for him to make a downpayment on the purchase of a decent, safe, and sanitary dwelling if he elects to purchase rather than to rent such a dwelling.

(c) The amount of a payment under this section is the amount, not in excess of $4,000, necessary to enable the displaced person to make the downpayment required under a conventional loan arrangement for the purchase of a comparable replacement dwelling plus expenses incident to such a purchase, except that such a payment must be applied to the downpayment or incidental expenses as shown on the closing statement and shall be matched by the displaced person for the same purpose to the extent that such a payment exceeds $2,000.

§ 15.41 Notice to tenants of initiation of negotiations for the property.

When a dwelling is being acquired by the Department or by a State agency as a direct result of a program financially assisted by the Department, tenants actually and lawfully occupying such a dwelling shall promptly be advised that negotiations have been initiated for the acquisition of that property and of the date of the initiation of such negotiations.

Subpart G—Relocation Assistance Advisory Services

§ 15.45 Relocation assistance advisory services.

(a) All programs of the Department or of State agencies receiving financial assistance from the Department shall provide for relocation assistance advisory services for persons displaced as a result of such programs, and for persons occupying property immediately adjacent to the real property so acquired who suffer substantial economic injury because of such an acquisition.

(b) The program of the Department for providing relocation assistance advisory services, which will be administered by the Facilities Engineering and Construction Agency of the Department, and the programs for that purpose of State agencies receiving financial assistance for such programs from the Department will:

(1) Determine with respect to persons displaced from their dwellings, their places of business, or their farm operations their needs for relocation assistance arising from such a displacement;

(2) Provide current, complete, and continuing information on the availability, prices, and rentals, of comparable decent, safe, and sanitary dwellings for sale or rent, and of comparable commercial properties and locations for displaced businesses;

(3) Assure that suitable replacement dwellings will be available to displaced persons prior to their displacement except to the extent that that requirement is waived or modified in extraordinary situations as provided for in § 15.15(d);

(4) Assist persons displaced from a place of business or farm operation in obtaining and becoming reestablished in a suitable replacement location;

(5) Supply information to displaced persons concerning Federal and State housing programs, disaster loan programs, and other Federal and State programs offering assistance to displaced persons, business concerns, or farm operations; and

(6) Provide such other advisory services to displaced persons as are appro-

priate to minimize the hardships to such persons in adjusting to the place of relocation.

(c) In order to assure maximum coordination of relocation activities in a community or area, the displacing agency should consult with appropriate local officials, consistent with the procedures contained in the Office of Management and Budget Circular No. A-95 (Revised), before approving any proposed project in that community or area.

(d) A displacing agency should consider whether to contract for providing the required relocation services with the central relocation agency in such a community or area or, if necessary, with another public agency or a private organization with the capability of providing such relocation services.

Subpart H—Federally Assisted Programs

§ 15.50 Assurances from State agencies.

(a) The Secretary will, through the cognizant agencies of the Department, obtain from State agencies applying to the Department for financial assistance, or entitled by statute to an allotment or apportionment of funds from the Department for financial assistance, with respect to programs or projects which will cause the displacement of any owner or tenant of real property the following assurances:

(1) That fair and reasonable relocation payments and assistance will be provided to or for displaced persons as provided for in this part;

(2) That tenants who will be dislocated will be promptly advised in writing of the initiation of negotiations with the owner of the property occupied by them (generally not in excess of 30 days from the date of initiation of negotiations), that relocation assistance advisory programs will be available to owners and tenants displaced or to be displaced, and that information concerning applicable benefits, policies, and procedures shall be provided them upon request; and

(3) That, within a reasonable period of time prior to displacement, decent, safe, and sanitary housing will be available to persons to be displaced.

(b) In the case of each program or project involving the acquisition of real property regardless of whether it results in the dislocation of a person, the assurance shall also provide that the State agency will be guided, to the greatest extent practicable under State law, by the real property acquisition policies prescribed in Subpart I of this part and will, in any event, pay to the owner of the real property expenses incidental to the transfer of title as prescribed in said Subpart I and, in the event the real property is not finally acquired, the litigation expenses of the owner as prescribed in said Subpart I.

(c) A State agency assurance called for by paragraph (a) or (b) of this section, shall, if appropriate, be accompanied by a statement specifying those provisions of such an assurance that the State agency is unable to give, or that it is not practicable for it to give, in whole, or in part, under its State law. Such an assurance shall also be accompanied by a statement specifying that part, if any, of the payments required under the State law of eminent domain to be made to the owner of real property to be acquired which has substantially the same purpose and effect as a relocation payment called for by this part but which, without regard to this part, is chargeable to the Federal financial assistance for the program or project involved or that no part of such payments is so chargeable. Each such statement shall be supported by an opinion of the chief or other appropriate legal officer of the State, containing an adequate discussion of any asserted legal inability or impracticability of the State agency to provide any part of the required assurances and the extent of any asserted inability of the State agency to pay for a part of the expenses called for by this part.

§ 15.51 Unsatisfactory assurances.

(a) If a State agency is unable to provide an assurance pursuant to § 15.50 that is satisfactory to the Secretary, the project involved shall not be financially assisted by the Department until such time as a satisfactory assurance is so provided unless other means of making the required payments and of providing the required assistance are provided for in a manner satisfactory to the Secretary.

(b) If no such assurance is provided only those projects in that State under the program involved will be financially assisted by the Department that do not involve the displacement of persons or the acquisition of land, as the case may be.

(c) If a State agency does not provide an assurance pursuant to § 15.50 because of a belief that no real property is to be acquired for or as a direct result of the project involved or that the project involved will not directly result in the dislocation of any person and if subsequently real property is in fact so acquired or a person is in fact so dislocated, the financial assistance for that project by the Department will forthwith be terminated until such time as the requisite payment or assistance is provided for to the satisfaction of the Secretary.

§ 15.52 Records.

Each displacing agency receiving financial assistance from the Department shall keep such records, and submit to the Secretary such reports, regarding relocation payments and assistance as may be prescribed by the Secretary. Such records shall include records of notifications to tenants to be displaced of the initiation of negotiation for the acquisition of the properties involved. Such records shall be retained for the period prescribed by the regulations for the affected program for the retention of records but in no event less than 3 years following the completion of the project involved, and shall be available for inspection by representatives of the Federal Government.

§ 15.53 State agency contracts for relocation assistance.

(a) A State agency whose programs or projects cause the dislocation of persons may enter into contracts with any person for providing the relocation assistance called for by this part, or may carry out its responsibilities in that regard through any Federal or State governmental agency or instrumentality having an established organization for conducting relocation assistance programs.

(b) A copy of any such contract or other agreement pursuant to this section shall be provided to the Secretary. Such a contract or other agreement shall contain such provisions as are consistent with this part, including the following provisions:

(1) Services will be provided consistent with the requirements of this part;

(2) Records will be kept and maintained as required by this part;

(3) The clauses required by Part 80 of this title implementing title VI of the Civil Rights Act of 1964 (Public Law 88-352);

(4) Such other provisions as may from time to time be called for by the Secretary.

§ 15.54 Appeals.

(a) Any person aggrieved by a determination as to eligibility for, or the amount of, a payment or assistance under the regulations in this part may appeal that determination in accordance with such procedures as may be established by the agency concerned.

(b) Each agency concerned shall establish procedures for such appeals, which shall assure that the appellant be accorded a fair hearing with the right to be represented by counsel, including the opportunity for making an oral presentation, that each appeal will be decided promptly, that each appeal decision will include a statement of the basis for the decision, that the agency will for a period of 3 years retain all documents associated with an appeal, that each appellant will have a right of final appeal to the head of the agency concerned, and that any amounts determined to be due the appellant will be promptly paid.

(c) A copy of each appeal decision by a State agency shall be promptly sent to the Department.

§ 15.55 Funding of the cost of payments and assistance.

(a) The cost to a State agency of providing the relocation payments and assistance to a person displaced by a State agency, and of providing payments to owners for the acquisition of real property by a State agency, as a direct result of a program or project for which that State agency receives financial assistance from the Department shall be a cost chargeable in accordance with that program or project unless the Secretary determines that a payment required by a State law of eminent domain has substantially the same purpose and effect as, and would duplicate, a payment otherwise chargeable as a program or project cost by virtue of this section.

(b) Except to the extent that the costs of such payments and assistance are, by section 207 and 211(a) of the Act, made fully chargeable up to $25,000 to the financial assistance provided by the Department, such costs shall be eligible for reimbursement in the same manner and to the same extent as other costs under the program or project involved. It should be noted that the provisions of those sections authorizing the first $25,000 to be fully chargeable to Federal financial assistance expired as of July 1, 1972.

(c) To the extent that Federal funds are available for the purpose, existing grants to, or contracts or agreements with, State agencies will be amended to reflect the additional cost, if any, of providing relocation payments and services to persons displaced on or after January 2, 1971, or the date on which the Act is fully effective in the particular State, and of providing the additional payments, if any, to the owner of property acquired on or after such a date, called for by this part within the limitations provided for by the Act.

(d) Reimbursement or other participation by the Department in payments made by State agencies for relocation will be limited, except in hardship cases, to those payments which are made to persons who move, or move their personal property, as a result of the receipt of written notice to vacate (which notice may have been given before or after negotiations for the acquisition of the real property involved).

(e) State agencies receiving financial assistance from the Department for programs or projects should carefully review such programs or projects for the purpose of eliminating or lessening the extent of the dislocation of persons in order to minimize the financial and social impact of such programs and projects and to avoid significant adverse effects on the quality of the human environment.

§ 15.56 Advance payments.

The Secretary may advance Federal funds to a State agency for relocation payments and assistance pursuant to this part if he determines that such an advance is necessary for the expeditious completion of the program or project.

Subpart I—Real Property Acquisition Policies

§ 15.60 Just compensation.

When real property is acquired by the Department or by a State agency as a direct result of a program or project receiving financial assistance from the Department, the owner of such real property shall be paid as just compensation therefor by the Department, or, to the greatest extent practicable under State law, by such a State agency, not less than the approved appraisal of its fair market value in accordance with § 15.61, even if the property is not acquired by eminent domain proceeding.

§ 15.61 Negotiations for the acquisition of real property.

(a) Before negotiations are initiated for the acquisition of real property, the acquiring agency shall have the real property appraised in terms of its fair market value, and the owner thereof or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(b) When negotiations are initiated for the acquisition of real property, the owner thereof shall be furnished a written statement concerning the proposed acquisition. Such a statement shall contain, as a minimum, the following:

(1) An identification of the real property including the buildings, structures, and other improvements on the land, as well as fixtures, consid-

ered to be a part of the real property, and the estate or interest therein to be acquired.

(2) The amount of the estimated just compensation for the property to be acquired, which shall not be less than the agency's approved appraisal of the fair market value of the property to be acquired, and a summary of the basis for determining the amount of such just compensation. Any decrease or increase in the fair market value of the real property prior to the date of its valuation caused by the public improvement for which the real property is being acquired, or by the likelihood that the real property would be acquired for such an improvement, other than a decrease due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. In the case of a partial taking, the damages, if any, to the remaining real property shall be separately stated.

(3) Appraisals shall be conducted as nearly as practicable pursuant to the Uniform Appraisal Standards for Federal Land Acquisition published in 1972 by the Interagency Land Acquisition Conference (G.P.O. 1972).

(c) The acquiring agency shall promptly either make an offer to purchase the property at the full amount of the just compensation therefor as so determined or initiate eminent domain or other proceeding that may be required to avoid a cloud on title to the property.

§ 15.62 Notices to tenants and owners.

(a) Tenants of real property to be acquired shall be promptly notified of the initiation of negotiations for the acquisition of that real property.

(b) To the greatest extent practicable, an owner or tenant lawfully occupying real property shall not be required to move from a dwelling, or to move his business or farm operation, without at least 90 days' written notice of the date by which such a move is required. Such a notice shall be served personally or by certified (or registered) first-class mail.

§ 15.63 Payment of certain expenses.

(a) The owner of real property acquired shall be reimbursed for expenses incidental to the transfer of title to the real property, and litigation expenses incurred when real property is not acquired, as provided for in sections 303 and 304 of the Act.

(b) State agencies receiving financial assistance from the Department for a program or project involving the acquisition of real property shall otherwise be guided by the land acquisition policies enunciated in sections 301 and 302 of the Act to the greatest extent practicable under State law.

Subpart J—Relocation Assistance Payments as Income

§ 15.67 Relocation payments and assistance as income or resources for purpose of other laws.

Section 216 of the Act provides that payments received under title II of the Act in relation to relocation assistance shall not be considered as income for the purposes of the Internal Revenue Code of 1954 or for the purposes of determining the eligibility or the extent of eligibility or any person for assistance under the Social Security Act or any other Federal law. For the treatment of such payments, particularly in relation to resources, in connection with assistance under the Social Security Act, see § 233.20 of this title (37 FR 19371, September 20, 1972).

PART 16—PROCEDURES OF THE DEPARTMENTAL GRANT APPEALS BOARD

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APPENDIX A—WHAT DISPUTES THE BOARD REVIEWS

AUTHORITY: 5 U.S.C. 301 and secs. 1, 5, 6, and 7 of Reorganization Plan No. 1 of 1953, 18 FR 2053, 67 Stat. 631 and authorities cited in the Appendix.

SOURCE: 46 FR 43817, Aug. 31, 1981, unless otherwise noted.

§ 16.1 What this part does.

This part contains requirements and procedures applicable to certain disputes arising under the HHS programs described in Appendix A. This part is designed to provide a fair, impartial, quick and flexible process for appeal from written final decisions. This part supplements the provisions in Part 74 of this title.

§ 16.2 Definitions.

(a) "Board" means the Departmental Grant Appeals Board of the Department of Health and Human Services. Reference below to an action of "the Board" means an action of the Chair, another Board member, or Board staff acting at the direction of a Board member. In certain instances, the provisions restrict action to particular Board personnel, such as the Chair or a Board member assigned to a case.

(b) Other terms shall have the meaning set forth in Part 74 of this title, unless the context below otherwise requires.

§ 16.3 When these procedures become available.

Before the Board will take an appeal, three circumstances must be present:

(a) The dispute must arise under a program which uses the Board for dispute resolution, and must meet any special conditions established for that program. An explanation is contained in Appendix A.

(b) The appellant must have received a final written decision, and must appeal that decision within 30 days after receiving it. Details of how final decisions are developed and issued, and what must be in them, are contained in 45 CFR 74.304.

(c) The appellant must have exhausted any preliminary appeal process required by regulation. For example, see 42 CFR Part 50 (Subpart D) for Public Health Service programs and Part 75 of this title for rate determinations and cost allocation plans. In such cases, the "final written decision" required for the Board's review is the decision resulting from the preliminiary review or appeal process. Appendix A contains further details.

§ 16.4 Summary of procedures below.

The Board's basic process is review of a written record (which both parties are given ample opportunity to develop), consisting of relevant documents and statements submitted by both parties (see § 16.8). In addition, the Board may hold an informal conference (see § 16.10). The informal conference primarily involves questioning of the participants by a presiding Board member. Conferences may be conducted by telephone conference call. The written record review also may be supplemented by a hearing involving an opportunity for examining evidence and witnesses, cross-examination, and oral argument (see § 16.11). A hearing is more expensive and time-consuming than a determination on the written record alone or with an informal conference. Generally, therefore, the Board will schedule a hearing only if the Board determines that there are complex issues or material facts in dispute, or that the Board's review would otherwise be significantly enhanced by a hearing. Where the amount in dispute is $25,000 or less, there are special expedited procedures (see § 16.12 of this part). In all cases, the Board has the flexibility to modify procedures to ensure fairness, to avoid delay, and to accommodate the peculiar needs of a given case. The Board makes maximum feasible use of preliminary informal steps to refine issues and to encourage resolution by the parties. The Board also has the capability to provide mediation services (see § 16.18).

§ 16.5 How the Board operates.

(a) The Board's professional staff consists of a Chair (who is also a Board member) and full- and part-time Board members, all appointed by the Secretary; and a staff of employees and consultants who are attorneys or persons from other relevant disciplines, such as accounting.

(b) The Chair will assign a Board member to have lead responsibility for each case (the "presiding Board member"). The presiding Board member will conduct the conference or hearing, if one is held. Each decision of the Board is issued by the presiding Board member and two other Board members.

(c) The Board staff assists the presiding Board member, and may request information from the parties; conduct telephone conference calls to request information, to clarify issues, or to schedule events; and assist in developing decisions and other documents in a case.

(d) The Chair will assure that no Board or staff member will participate in a case where his or her impartiality could reasonably be questioned.

(e) The Board's powers and responsibilities are set forth in § 16.13.

§ 16.6 Who represents the parties.

The appellant's notice of appeal, or the first subsequent submission to the Board, should specify the name, address and telephone number of the appellant's representative. In its first submission to the Board and the appellant, the respondent (i.e., the federal party to the appeal) should specify the name, address and telephone number of the respondent's representative.

§ 16.7 The first steps in the appeal process: the notice of appeal and the Board's response.

(a) As explained in 45 CFR 74.304, a prospective appellant must submit a notice of appeal to the Board within 30 days after receiving the final decision. The notice of appeal must include a copy of the final decision, a statement of the amount in dispute in the appeal, and a brief statement of why the decision is wrong.

(b) Within ten days after receiving the notice of appeal, the Board will send an acknowledgment, enclose a copy of these procedures, and advise the appellant of the next steps. The Board will also send a copy of the notice of appeal, its attachments, and the Board's acknowledgment to the respondent. If the Board Chair has determined that the appeal does not meet the conditions of § 16.3 or if further information is needed to make this determination, the Board will notify the parties at this point.

§ 16.8 The next step in the appeal process: preparation of an appeal file and written argument.

Except in expedited cases (generally those of $25,000 or less; see § 16.12 for details), the appellant and the respondent each participate in developing an appeal file for the Board to review. Each also submits written argument in support of its position. The responsibilities of each are as follows:

(a) *The appellant's responsibility.* Within 30 days after receiving the acknowledgment of the appeal, the appellant shall submit the following to the Board (with a copy to the respondent):

(1) An appeal file containing the documents supporting the claim, tabbed and organized chronologically and accompanied by an indexed list identifying each document. The appellant should include only those documents which are important to the Board's decision on the issues in the case.

(2) A written statement of the appellant's argument concerning why the respondent's final decision is wrong (appellant's brief).

(b) *The respondent's responsibility.* Within 30 days after receiving the appellant's submission under paragraph (a) of this section, the respondent shall submit the following to the Board (with a copy to the appellant):

(1) A supplement to the appeal file containing any additional documents supporting the respondent's position, organized and indexed as indicated under paragraph (a) of this section. The respondent should avoid submitting duplicates of documents submitted by the appellant.

(2) A written statement (respondent's brief) responding to the appellant's brief.

(c) *The appellant's reply.* Within 15 days after receiving the respondent's submission, the appellant may submit a short reply. The appellant should avoid repeating arguments already made.

(d) *Cooperative efforts.* Whenever possible, the parties should try to develop a joint appeal file, agree to preparation of the file by one of them, agree to facts to eliminate the need for some documents, or agree that one party will submit documents identified by the other.

(e) *Voluminous documentation.* Where submission of all relevant documents would lead to a voluminous appeal file (for example where review of a disputed audit finding of inadequate documentation might involve thousands of receipts), the Board will consult with the parties about how to reduce the size of the file.

§ 16.9 How the Board will promote development of the record.

The Board may, at the time it acknowledges an appeal or at any appropriate later point, request additional documents or information; request briefing on issues in the case; issue orders to show cause why a proposed finding or decision of the Board should not become final; hold preliminary conferences (generally by telephone) to establish schedules and refine issues; and take such other steps as the Board determines appropriate to develop a prompt, sound decision.

§ 16.10 Using a conference.

(a) Once the Board has reviewed the appeal file, the Board may, on its own or in response to a party's request, schedule an informal conference. The conference will be conducted by the presiding Board member. The purposes of the conference are to give the parties an opportunity to make an oral presentation and the Board an opportunity to clarify issues and question both parties about matters which the Board may not yet fully understand from the record.

(b) If the Board has decided to hold a conference, the Board will consult or correspond with the parties to schedule the conference, identify issues, and discuss procedures. The Board will identify the persons who will be allowed to participate, along with the parties' representatives, in the conference. The parties can submit with their briefs under § 16.8 a list of persons who might participate with them, indicating how each person is involved in the matter. If the parties wish, they may also suggest questions or areas of inquiry which the Board may wish to pursue with each participant.

(c) Unless the parties and the Board otherwise agree, the following procedures apply:

(1) Conferences will be recorded at Department expense. On request, a party will be sent one copy of the transcript. The presiding Board member will insure an orderly transcript by controlling the sequence and identification of speakers.

(2) Only in exceptional circumstances will documents be received at a conference. Inquiry will focus on material in the appeal file. If a party finds that further documents should be in the record for the conference, the party should supplement the appeal file, submitting a supplementary index and copies of the documents to the Board and the other party not less than ten days prior to the conference.

(3) Each party's representative may make an oral presentation. Generally, the only oral communications of other participants will consist of statements requested by the Board or responses to the Board's questions. The Board will allow reply comment, and may allow short closing statements. On request, the Board may allow the participants to question each other.

(4) There will be no post-conference submissions, unless the Board determines they would be helpful to resolve the case. The Board may require or

allow the parties to submit proposed findings and conclusions.

§16.11 Hearing.

(a) *Electing a hearing.* If the appellant believes a hearing is appropriate, the appellant should specifically request one at the earliest possible time (in the notice of appeal or with the appeal file). The Board will approve a request (and may schedule a hearing on its own or in response to a later request) if it finds there are complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing, or if the Board determines that its decisionmaking otherwise would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing. The Board will also provide a hearing if otherwise required by law or regulation.

(b) *Preliminary conference before the hearing.* The Board generally will hold a prehearing conference (which may be conducted by telephone conference call) to consider any of the following: the possibility of settlement; simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; scheduling the hearing; and any other matter that may aid in resolving the appeal. Normally, this conference will be conducted informally and off the record; however, the Board, after consulting with the parties, may reduce results of the conference to writing in a document which will be made part of the record, or may transcribe proceedings and make the transcript part of the record.

(c) *Where hearings are held.* Hearings generally are held in Washington, D.C. In exceptional circumstances, the Board may hold the hearing at an HHS Regional Office or other convenient facility near the appellant.

(d) *Conduct of the hearing.* (1) The presiding Board member will conduct the hearing. Hearings will be as informal as reasonably possible, keeping in mind the need to establish an orderly record. The presiding Board member generally will admit evidence unless it is determined to be clearly irrelevant, immaterial or unduly repetitious, so the parties should avoid frequent objections to questions and documents. Both sides may make opening and closing statements, may present witnesses as agreed upon in the prehearing conference, and may cross-examine. Since the parties have ample opportunity to develop a complete appeal file, a party may introduce an exhibit at the hearing only after explaining to the satisfaction of the presiding Board member why the exhibit was not submitted earlier (for example, because the information was not available).

(2) The Board may request the parties to submit written statements of witnesses to the Board and each other prior to the hearing so that the hearing will primarily be concerned with cross-examination and rebuttal.

(3) False statements of a witness may be the basis for criminal prosecution under sections 287 and 1001 of Title 18 of the United States Code.

(4) The hearing will be recorded at Department expense.

(e) *Procedures after the hearing.* The Board will send one copy of the transcript to each party as soon as it is received by the Board. At the discretion of the Board, the parties may be required or allowed to submit post-hearing briefs or proposed findings and conclusions (the parties will be informed at the hearing). A party should note any major prejudicial transcript errors in an addendum to its post-hearing brief (or if no brief will be submitted, in a letter submitted within a time limit set by the Board).

§16.12 The expedited process.

(a) *Applicability.* Where the amount in dispute is $25,000 or less, the Board will use these expedited procedures, unless the Board Chair determines otherwise under paragraph (b) of this section. If the Board and the parties agree, the Board may use these procedures in cases of more than $25,000.

(b) *Exceptions.* If there are unique or unusually complex issues involved, or other exceptional circumstances, the Board may use additional procedures.

(c) *Regular expedited procedures.* (1) Within 30 days after receiving the Board's acknowledgment of the appeal (see § 16.7), each party shall submit to the Board and the other party any relevant background documents (organized as required under § 16.8), with a cover letter (generally not to exceed ten pages) containing any arguments the party wishes to make.

(2) Promptly after receiving the parties' submissions, the presiding Board member will arrange a telephone conference call to receive the parties' oral comments in response to each other's submissions. After notice to the parties, the Board will record the call. The Board member will advise the parties whether any opportunities for further briefing, submissions or oral presentations will be established. Cooperative efforts will be encouraged (see § 16.8(d)).

(3) The Board may require the parties to submit proposed findings and conclusions.

(d) *Special expedited procedures where there has already been review.* Some HHS components (for example, the Public Health Service) use a board or other relatively independent reviewing authority to conduct a formal preliminary review process which results in a written decision based on a record including documents or statements presented after reasonable notice and opportunity to present such material. In such cases, the following rules apply to appeals of $25,000 or less instead of those under paragraph (c) of this section:

(1) Generally, the Board's review will be restricted to whether the decision of the preliminary review authority was clearly erroneous. But if the Board determines that the record is inadequate, or that the procedures under which the record was developed in a given instance were unfair, the Board will not be restricted this way.

(2) Within 30 days after receiving the Board's acknowledgment of appeal (see § 16.7), the parties shall submit the following:

(i) The appellant shall submit to the Board and the respondent a statement why the decision was clearly erroneous. Unless allowed by the Board after consultation with the respondent, the appellant shall not submit further documents.

(ii) The respondent shall submit to the Board the record in the case. If the respondent has reason to believe that all materials in the record already are in the possession of the appellant, the respondent need only send the appellant a list of the materials submitted to the Board.

(iii) The respondent may, if it wishes, submit a statement why the decision was not clearly erroneous.

(3) The Board, in its discretion, may allow or require the parties to present further arguments or information.

§ 16.13 Powers and responsibilities.

In addition to powers specified elsewhere in these procedures, Board members have the power to issue orders (including "show cause" orders); to examine witnesses; to take all steps necessary for the conduct of an orderly hearing; to rule on requests and motions, including motions to dismiss; to grant extensions of time for good reasons; to dismiss for failure to meet deadlines and other requirements; to close or suspend cases which are not ready for review; to order or assist the parties to submit relevant information; to remand a case for further action by the respondent; to waive or modify these procedures in a specific case with notice to the parties; to reconsider a Board decision where a party promptly alleges a clear error of fact or law; and to take any other action necessary to resolve disputes in accordance with the objectives of these procedures.

§ 16.14 How Board review is limited.

The Board shall be bound by all applicable laws and regulations.

§ 16.15 Failure to meet deadlines and other requirements.

(a) Since one of the objectives of administrative dispute resolution is to provide a decision as fast as possible consistent with fairness, the Board will not allow parties to delay the process unduly. The Board may grant extensions of time, but only if the party gives a good reason for the delay.

(b) If the appellant fails to meet any filing or procedural deadlines, appeal file or brief submission requirements, or other requirements established by the Board, the Board may dismiss the appeal, may issue an order requiring the party to show cause why the appeal should not be dismissed, or may take other action the Board considers appropriate.

(c) If the respondent fails to meet any such requirements, the Board may issue a decision based on the record submitted to that point or take such other measures as the Board considers appropriate.

§ 16.16 Parties to the appeal.

(a) The only parties to the appeal are the appellant and the respondent. If the Board determines that a third person is a real party in interest (for example, where the major impact of an audit disallowance would be on the grantee's contractor, not on the grantee), the Board may allow the third person to present the case on appeal for the appellant or to appear with a party in the case, after consultation with the parties and if the appellant does not object.

(b) The Board may also allow other participation, in the manner and by the deadlines established by the Board, where the Board decides that the intervenor has a clearly identifiable and substantial interest in the outcome of the dispute, that participation would sharpen issues or otherwise be helpful in resolution of the dispute, and that participation would not result in substantial delay.

§ 16.17 Ex parte communications (communications outside the record).

(a) A party shall not communicate with a Board or staff member about matters involved in an appeal without notice to the other party. If such communication occurs, the Board will disclose it to the other party and make it part of the record after the other party has an opportunity to comment. Board members and staff shall not consider any information outside the record (see § 16.21 for what the record consists of) about matters involved in an appeal.

(b) The above does not apply to the following: communications among Board members and staff; communications concerning the Board's administrative functions or procedures; requests from the Board to a party for a document (although the material submitted in response also must be given to the other party); and material which the Board includes in the record after notice and an opportunity to comment.

§ 16.18 Mediation.

(a) *In cases pending before the Board.* If the Board decides that mediation would be useful to resolve a dispute, the Board, in consultation with the parties, may suggest use of mediation techniques and will provide or assist in selecting a mediator. The mediator may take any steps agreed upon by the parties to resolve the dispute or clarify issues. The results of mediation are not binding on the parties unless the parties so agree in writing. The Board will internally insulate the mediator from any Board or staff members assigned to handle the appeal.

(b) *In other cases.* In any other grants dispute, the Board may, within the limitations of its resources, offer persons trained in mediation skills to aid in resolving the dispute. Mediation services will only be offered at the request, or with the concurrence, of a responsible federal program official in the program under which the dispute arises. The Board will insulate the mediator if any appeal subsequently arises from the dispute.

§ 16.19 How to calculate deadlines.

In counting days, include Saturdays, Sundays, and holidays; but if a due date would fall on a Saturday, Sunday or federal holiday, then the due date is the next federal working day.

§ 16.20 How to submit material to the Board.

(a) All submissions should be addressed as follows: Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street SW., Washington, D.C. 20201.

(b) All submissions after the notice of appeal should identify the Board's docket number (the Board's acknowledgement under § 16.7 will specify the docket number).

(c) Unless the Board otherwise specifies, parties shall submit to the Board an original and two copies of all materials. Each submission other than the notice of appeal, must include a statement that one copy of the materials has been sent to the other party, identifying when and to whom the copy was sent.

(d) Unless hand delivered, all materials should be sent to the Board and the other party by certified or registered mail, return receipt requested.

(e) The Board considers material to be submitted on the date when it is postmarked or hand delivered to the Board.

§ 16.21 Record and decisions.

(a) Each decision is issued by three Board members (see § 16.5(b)), who base their decision on a record consisting of the appeal file; other submissions of the parties; transcripts or other records of any meetings, conferences or hearings conducted by the Board; written statements resulting from conferences; evidence submitted at hearings; and orders and other documents issued by the Board. In addition, the Board may include other materials (such as evidence submitted in another appeal) after the parties are given notice and an opportunity to comment.

(b) The Board will promptly notify the parties in writing of any disposition of a case and the basis for the disposition.

§ 16.22 The effect of an appeal.

(a) *General.* Until the Board disposes of an appeal, the respondent shall take no action to implement the final decision appealed.

(b) *Exceptions.* The respondent may—

(1) Suspend funding (see § 74.114 of this title);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal;

(3) In programs listed in Appendix A, B.(a)(1), implement a decision to disallow Federal financial participation claimed in expenditures reported on a statement of expenditures, by recovering, withholding or offsetting payments, if the decision is issued before the reported expenditures are included in the calculation of a subsequent grant; or

(4) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

§ 16.23 How long an appeal takes.

The Board has established general goals for its consideration of cases, as follows (measured from the point when the Board receives the first submission after the notice of appeal):

—for regular review based on a written record under § 16.8, 6 months. When a conference under § 16.10 is held, the goal remains at 6 months, unless a requirement for post-conference briefing in a particular case renders the goal unrealistic.

—for cases involving a hearing under § 16.11, 9 months.

—for the expedited process under § 16.12, 3 months.

These are goals, not rigid requirements. The paramount concern of the Board is to take the time needed to review a record fairly and adequately in order to produce a sound decision. Furthermore, many factors are beyond the Board's direct control, such as unforeseen delays due to the parties' negotiations or requests for extensions, how many cases are filed, and Board resources. On the other hand, the parties may agree to steps which may shorten review by the Board; for example, by waiving the right to submit a brief, by agreeing to shorten submission schedules, or by electing the expedited process.

APPENDIX A—WHAT DISPUTES THE BOARD REVIEWS

A. What this Appendix covers.

This Appendix describes programs which use the Board for dispute resolution, the types of disputes covered, and any conditions for Board review of final written decisions resulting from those disputes. Disputes under programs not specified in this Appendix may be covered in a program regulation or in a memorandum of understanding between the Board and the head of the appropriate HHS operating component or other agency responsible for administering the program. If in doubt, call the Board. Even though a dispute may be covered here, the Board still may not be able to review it if the limits in paragraph F apply.

B. Mandatory grant programs.

(a) The Board reviews the following types of final written decisions in disputes arising in HHS programs authorizing the award of mandatory grants:

(1) Disallowances under Titles I, IV, VI, X, XIV, XVI(AABD), XIX, and XX of the Social Security Act, including penalty disallowances such as those under sections 403(g) and 1903(g) of the Act and fiscal disallowances based on quality control samples.

(2) Disallowances in mandatory grant programs administered by the Public Health Service, including Title V of the Social Security Act.

(3) Disallowances in the programs under sections 113 and 132 of the Developmental Disabilities Act.

(4) Disallowances under Title III of the Older American Act.

(5) Decisions relating to repayment and withholding under block grant programs as provided in 45 CFR 96.52.

(b) In some of these disputes, there is an option for review by the head of the granting agency prior to appeal to the Board. Where an appellant has requested review by the agency head first, the "final written decision" required by § 16.3 for purposes of Board review will generally be the agency head's decision affirming the disallowance. If the agency head declines to review the disallowance or if the appellant withdraws its request for review by the agency head, the original disallowance decision is the "final written decision." In the latter case the 30-day period for submitting a notice of appeal begins with the date of receipt of the notice declining review or with the date of the withdrawal letter.

C. Direct, discretionary project programs.

(a) The Board reviews the following types of final written decisions in disputes arising in any HHS program authorizing the award of direct, discretionary project grants or cooperative agreements:

(1) A disallowance or other determination denying payment of an amount claimed under an award, or requiring return or setoff of funds already received. This does not apply to determinations of award amount or disposition of unobligated balances, or selection in the award document of an option for disposition of program-related income.

(2) A termination for failure to comply with the terms of an award.

(3) A denial of a noncompeting continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award.

(4) A voiding (a decision that an award is invalid because it was not authorized by statute or regulation or because it was fraudulently obtained).

(b) Where an HHS component uses a preliminary appeal process (for example, the Public Health Service), the "final written decision" for purposes of Board review is the decision issued as a result of that process.

D. Cost allocation and rate disputes.

The Board reviews final written decisions in disputes which may affect a number of HHS programs because they involve cost allocation plans or rate determinations. These include decisions related to cost allocation plans negotiated with State or local governments and negotiated rates such as indirect cost rates, fringe benefit rates, computer rates, research patient care rates, and other special rates. The "final written decision" for purposes of Board review of these disputes is the decision issued as a result of the preliminary appeal process at Part 75 of this title.

E. SSI agreement disputes.

The Board reviews disputes in the Supplemental Security Income (SSI) program arising under agreements for Federal administration of State supplementary payments under section 1616 of the Social Security Act or mandatory minimum supplements under section 212 of Pub. L. 93-66. In these cases, the Board provides an opportunity to be heard and offer evidence at the Secretarial level of review as set out in the applicable agreements. Thus, the "final written decision" for purposes of Board review is that determination appealable to the Secretary under the agreement.

F. Where Board review is not available.

The Board will not review a decision if a hearing under 5 U.S.C. 554 is required by statute, if the basis of the decision is a violation of applicable civil rights or nondiscrimination laws or regulations (for example, Title VI of the Civil Rights Act), or if some other hearing process is established pursuant to statute.

G. How the Board determines whether it will review a case.

Under § 16.7, the Board Chair determines whether an appeal meets the requirements of this Appendix. If the Chair finds that there is some question about this, the Board will request the written opinion of the HHS component which issued the decision. Unless the Chair determines that the opinion is clearly erroneous, the Board will be bound by the opinion. If the HHS component does not respond within a time set by the Chair, or cannot determine whether the Board clearly does or does not have jurisdiction, the Board will take the appeal.

[46 FR 43817, Aug. 31, 1981, as amended at 46 FR 48592, Oct. 1, 1981]

PART 17—RELEASE OF ADVERSE INFORMATION TO NEWS MEDIA

Sec.

17.1 Definition.
17.2 Basic poilicy.
17.3 Precautions to be taken.
17.4 Regulatory investigations and trial-type proceedings.
17.5 Context to be reflected.
17.6 Advance notice.
17.7 Retractions or corrections.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 41 FR 3, Jan. 2, 1976, unless otherwise noted.

§ 17.1 Definition.

Adverse information released by an agency means any statement or release by the Department or any principal operating component made to the news media inviting public attention to an action or a finding by the Department or principal operating component of the Department which may adversely affect persons or organizations identified therein. This part does not apply to nor is it affected by any disclosure of records to the public in response to requests made under the Freedom of Information Act (Pub. L. 90-23). The criteria for such disclosures are set forth in the Department's Public Information Regulation (45 CFR Part 5).

§ 17.2 Basic policy.

All adverse information release to news media shall be factual in content and accurate in description. Disparaging terminology not essential to the content and purpose of the publicity shall be avoided.

§ 17.3 Precautions to be taken.

The issuing organization shall take reasonable precautions to assure that information released is accurate and that its release fulfills an authorized purpose.

§ 17.4 Regulatory investigations and trial-type proceedings.

Adverse information relating to regulatory investigations of specifically identified persons or organizations or to pending agency trial-type proceedings shall be released only in limited circumstances in accordance with the criteria outlined below:

(a) Where the Department or a principal operating component determines that there is a significant risk that the public health or safety may be impaired or substantial economic harm may occur unless the public is notified immediately, it may release information to news media as one of the means of notifying the affected public speedily and accurately. However, where the Department or principal operating component determines that public harm can be avoided by immediate discontinuance of an offending practice, a respondent shall be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of release of adverse information by the agency.

(b) Where it is required in order to bring notice of pending agency adjudication to persons likely to desire to participate therein or likely to be affected by that or a related adjudication, the Department or principal operating component shall rely on the news media to the extent necessary to provide such notice even though it may be adverse to a respondent.

§ 17.5 Context to be reflected.

The authority for and the character of the information shall be made clear, where appropriate, the release shall explain the nature of any studies performed, the sources of relevant data, the areas in which administrative findings of fact were made, and whether the information is based on allegations subject to subsequent adjudication.

§ 17.6 Advance notice.

Any respondent or prospective respondent in an agency proceeding shall, if practicable and consistent with the nature of the proceeding, be given advance notice of information to be released about the proceeding and a reasonable opportunity to prepare in advance a response to the information released.

§ 17.7 Retractions or corrections.

Where the Assistant Secretary for Public Affairs finds that information released by the Department was misleading or a misstatement of fact and any person named therein requests a retraction or correction, the Department shall issue a retraction or correction in the same manner to all of the media outlets that received the original information (or as many of them as is feasible). Where information shown to be misleading or misstatement of fact has been released by a principal operating component of the Department and any person named therein requests a retraction or correction, the agency head shall issue a retraction or correction in the same manner to all of the media outlets that received the original information (or as many of them as is feasible).

PART 19—LIMITATIONS ON PAYMENT OR REIMBURSEMENT FOR DRUGS

Sec.
19.1 Purpose.
19.2 Definitions.
19.3 Cost limitation.
19.4 Establishment of pharmaceutical reimbursement board.
19.5 Determination of maximum allowable cost.
19.6 Review and revision of maximum allowable cost determinations.

AUTHORITY: Sec. 205(c), Pub. L. 81-152, 63 Stat. 390 (40 U.S.C. 486(c)); Sec. 224(c), Pub. L. 92-603, 86 Stat. 1395 (42 U.S.C. 1396 (b)(i)(1)); Sec. 223 (a), (b), (c), (d), Pub. L. 92-603, 86 Stat. 1393, 1394 (42 U.S.C. 1395x (v)(1)(A)); Sec. 237(b), Pub. L. 90-248, 81 Stat. 911, as amended (42 U.S.C. 1396a(a) (30), as amended); Sec. 223(a), Pub. L. 92-603, 86 Stat. 1411 (42 U.S.C. 1395f(b)); Sec. 215, Pub. L. 78-410, 58 Stat. 690, as amended (42 U.S.C. 216, as amended).

SOURCE: 40 FR 32302, July 31, 1975, unless otherwise noted.

§ 19.1 Purpose.

(a) This Part establishes Department of Health and Human Services procedures for determining drug costs and, where applicable, dispensing fees which the Department will use for the purpose of determining:

(1) Reimbursement to providers and health maintenance organizations under the Medicare program.

(2) Reimbursement to States under State administered health, welfare, and social service programs.

(3) Allowable costs under projects for health services.

(b) Policies and procedures, which will be consistent with the policies and procedures set forth in this Part, will be published in the HHS Procurement Regulations, Title 41, Chapter 3, Code of Federal Regulations, governing the direct purchase of drugs by the Department and the purchase or supply of drugs by contractors of the Department.

(c) This Part does not establish procedures for fixing the actual amount of reimbursement to which providers will be entitled for dispensing drugs. Rather, it establishes procedures for setting a limit on what the individual program regulations and policies might otherwise provide. If the authorizing legislation for a particular program, or the program regulation or policies adopted or issued under that legislation, provides for a lower rate of reimbursement than this regulation permits, then the program reimbursement rate, being lower, will necessarily control the actual payment.

§ 19.2 Definitions.

For the purposes of this Part:

(a) "Board" means the Pharmaceutical Reimbursement Board established by § 19.4 of this Part.

(b) "Drug" means a drug product, including one that may be dispensed without a prescription, containing one or more active ingredients in a specified dosage form and strength. Each dosage form and strength of a drug is a separate drug.

(c) "Program Agency" means the Federal agency, state agency, local governmental unit, contractor or other institution or organization which reimburses or pays providers under any of the programs or activities described in § 19.1.

(d) "Multiple-source drug" means a drug marketed or sold by two or more formulators or labelers or a drug marketed or sold by the same formulator or labeler under two or more different proprietary names or both under a proprietary name and without such a name.

(e) "Provider" means one who furnishes medical or pharmaceutical services or supplies for which he is entitled to reimbursement or payment under any of the programs or activities described in § 19.1.

(f) "Acquisition cost" means the price generally and currently paid by providers for a drug marketed or sold by a particular formulator or labeler in the package size of drug most frequently purchased by providers.

§ 19.3 Cost limitation.

(a) The amount which the Department will recognize for reimbursement or payment purposes for any drug used in the programs or activities described in § 19.1 shall not exceed the lowest of:

(1) The maximum allowable cost (MAC) of the drug, if any, established in accordance with § 19.5 plus a reasonable dispensing fee;

(2) The acquisition cost of the drug plus a reasonable dispensing fee; or

(3) The provider's usual and customary charge to the public for the drug; *Provided*, That: The MAC established for any drug shall not apply to a brand of that drug prescribed for a patient which the prescriber has certified in his own handwriting is medically necessary for that patient; and *provided further*, That: Where compensation for drug dispensing is included in some other amount payable to the provider by the reimbursing or paying program agency, a separate dispensing fee will not be recognized.

(b) Each program agency shall estimate the acquisition cost of each drug for which it reimburses or pays a provider. Such estimate should be consistent with any drug price information furnished the program agency by the Department.

[40 FR 32302, July 31, 1975; 40 FR 36342, Aug. 20, 1975]

§ 19.4 Establishment of pharmaceutical reimbursement board.

(a) There is established in the Health Care Financing Administration a Pharmaceutical Reimbursement Board consisting of six full time employees of the Department, representing the principal offices and agencies concerned with developing and implementing cost determinations under this part. The Director of the Bureau of Program Policy, HCFA, or his designee shall serve as the Chairman.

(b) The Board may make use of outside consultants to advise it on any technical or complex issues during its consideration of a proposed MAC.

(Sec. 1102, 49 Stat. 647 (42 U.S.C. 1302))

[43 FR 35311, Aug. 9, 1978, as amended at 44 FR 55877, Sept. 28, 1979]

§ 19.5 Determination of maximum allowable cost.

(a) Identification of drugs to which a MAC may be applied. The Board shall identify those multiple source drugs for which significant amounts of Federal funds are or may be expended under the programs and for the activities described in § 19.1 and for which there are or may be significantly different prices.

(b) Review by the Food and Drug Administration. The Board shall notify the Food and Drug Adminstration in writing of each drug identified in accordance with paragraph (a) of this section. The Food and Drug Administration, in response to each such notification, shall advise the Board in writing whether there is any regulatory action, either pending or under consideration, bearing upon the marketability of, or to establish a bioequivalence requirement for, the drug and shall further advise the Board whether, in the judgment of the Food and Drug Administration, any such action is a reason for delaying or withholding the establishment of a MAC for the drug.

(c) Initial determination of lowest unit price. For each drug identified in accordance with paragraph (a) of this section and for which the Food and Drug Administration has not advised delaying or withholding the establishment of a MAC, the Board shall make an initial determination of the lowest unit price at which the drug is widely and consistently available from any formulator or labeler. This determination will be based on the package size of drug most frequently purchased by providers. If it appears to the Board that a drug is or will be unavailable to providers in one or more localities at the same lowest unit price at which it is available elsewhere, the Board shall make a separate determination for each such locality.

(d) Proposed MAC. The Board shall determine whether the lowest unit price should be proposed as the maximum allowable cost (MAC) for the drug.

(e) Notice and comment. The Board shall publish as a notice in the FEDERAL REGISTER each proposed MAC and a summary of the Board's reasons for its proposal. The notice shall invite interested persons and organizations to submit in writing comments on the proposed MAC. All comments received will be maintained for public inspection at the office of the Board.

(f) Public hearing. A public hearing will be held with respect to each proposed MAC. The hearing will be held no sooner than 45 days from the date of the notice in the FEDERAL REGISTER. The dates, time, and location of the hearing shall appear in the notice.

(g) Conduct of hearing. The hearing shall be open to the public and a transcript shall be made of the proceedings. Persons or organizations wishing to make presentations shall submit to the Board's Executive Secretary, no later than 15 days prior to the hearing, a minimum of 20 copies of the proposed oral presentation in its entirety, together with all supporting studies or materials and the names and addresses of proposed participants. The Board will allot time for each oral presentation which, in the judgment of the Board, is relevant to the proposed MAC. Those requesting to appear at the hearing in accordance with this paragraph will be notified in writing.

(h) Proposed final determination. After considering the written comments, the presentations made at the public hearing and any other evidence included as a part of the record, the Board shall decide whether a MAC should be established for each drug for which a notice of proposed MAC was published and, if so, shall make a proposed final determination of a MAC for each drug.

(i) Administrator's concurrence. The Board shall submit each proposed final determination to the Adminstrator of HCFA. The Administrator shall concur or nonconcur, but may not modify the Board's proposed final determination. If the Administrator concurs, the proposed determination becomes final. If the Adminstrator nonconcurs, the Board may reinstitute proceedings under this section to adopt a MAC for that drug at a different level.

(j) Publication. Notice of the final determination shall be published in the FEDERAL REGISTER together with a statement of the Board's reasons for its determination.

(Sec. 1102, 49 Stat. 647 (42 U.S.C. 1302))

[43 FR 35311, Aug. 9, 1978]

§ 19.6 Review and revision of maximum allowable cost determinations.

The Board will maintain and make publicly available a list of MAC determinations and will regularly review the list to assure that continued application of each MAC is justified. Any individual or organization may at any time request in writing that a MAC determination be revised or withdrawn. The request shall set forth the specific change requested, the justification for the change, and available data in support of the request. Whenever it appears to the Board that there are substantial grounds for reviewing a MAC determination, it shall institute such review in accordance with the procedures set forth in § 19.5. Should there be no substantial grounds for reviewing a MAC determination, the Board shall notify any person or organization requesting review in accordance with this section of its denial in writing. Such notice shall also include a statement of the Board's reasons for denying the request.

PART 30—CLAIMS COLLECTION

Sec.

30.1 Incorporation by reference.
30.2 Scope of regulations.
30.3 Delegation of authority.

AUTHORITY: Sec. 3, 80 Stat. 309, 31 U.S.C. 951-953; Joint Regulations of GAO and Department of Justice, 4 CFR Ch. II Parts 101-105; Statement of Organization and Delegation of Authority of the Department as amended, 31 FR 16375.

§ 30.1 Incorporation by reference.

The regulations of this part incorporate herein and supplement as necessary for Department operation all provisions of the Joint Regulations issued by the Comptroller General of the United States and the Attorney General of the United States under section 3 of the Federal Claims Collection Act of 1966, which prescribes standards for administrative collection of civil claims by the Government as well as compromise, suspension, or termination of agency collection action, with respect to claims not exceeding $20,000 exclusive of interest, and the referral to the General Accounting Office, and to the Department of Justice for litigation, of civil claims by the Government.

[32 FR 17891, Dec. 14, 1967]

§ 30.2 Scope of regulations.

The standards set forth in this chapter are not applicable where standards are prescribed under statutes other than the Federal Claims Collection Act of 1966, for compromise or termination of collection action, or waiver in whole or in part of claims thereunder.

[32 FR 17891, Dec. 14, 1967]

§ 30.3 Delegation of authority.

(a) The Secretary delegated to the Department Claims Officer the authority to perform the duties vested in him by the Federal Claims Collection Act of 1966 (31 U.S.C. 951-953) as amended, except with respect to erroneous payments under Titles II and XVIII of the Social Security Act.

(b) The Department Claims Officer shall compromise, suspend or terminate claims referred to him after administrative collection efforts have been exhausted in accordance with the provisions of this part.

(c) The appropriate office, local, regional or headquarters, shall take all necessary administrative action required under the Act and Joint Regulations, except that, with respect to claims of $800 or more, no compromise of a claim shall be effected, nor collection action suspended or terminated without the prior approval of the Department Claims Officer, or the following specific delegates:

(1) The Deputy Assistant General Counsel, Business and Administrative Law Division, Office of General Counsel;

(2) The Chief, Litigation and Claims Branch, Business and Administrative Law Division, Office of General Counsel;

(3) The Regional Attorneys except with respect to claims arising out of activities of the Public Health Service.

[40 FR 40162, Sept. 2, 1975]

PART 35—TORT CLAIMS AGAINST THE GOVERNMENT

Subpart A—General

Sec.

35.1 Scope of regulations.

Subpart B—Procedures

35.2 Administrative claim; when presented; place of filing.
35.3 Administrative claim; who may file.

Sec.
35.4 Administrative claims; evidence and information to be submitted.
35.5 Investigation, examination, and determination of claims.
35.6 Final denial of claim.
35.7 Payment of approved claims.
35.8 Release.
35.9 Penalties.
35.10 Limitation on Department's authority.

AUTHORITY: Sec. 1(a), 80 Stat. 306; 28 U.S.C. 2672; 28 CFR Part 14.

SOURCE: 32 FR 14101, Oct. 11, 1967, unless otherwise noted.

Subpart A—General

§ 35.1 Scope of regulations.

The regulations in this part shall apply only to claims asserted under the Federal Tort Claims Act, as amended, 28 U.S.C. sections 2671-2680, accruing on or after January 18, 1967, for money damages against the United States for damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Department of Health and Human Services while acting within the scope of his office or employment.

Subpart B—Procedures

§ 35.2 Administrative claim; when presented; place of filing.

(a) For purposes of the regulations in this part, a claim shall be deemed to have been presented when the Department of Health and Human Services receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain for damage to or loss of property, for personal injury, or for death, alleged to have occurred by reason of the incident. A claim which should have been presented to the Department but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to the Department as of the date that the claim is received by the Department. A claim mistakenly addressed to or filed with the Department shall forthwith be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final action by the Department Claims Officer or prior to the exercise of the claimant's option to bring suit under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

(c) Forms may be obtained and claims may be filed, with the office, local, regional, or headquarters, of the constituent organization having jurisdiction over the employee involved in the accident or incident, or with the Department of Health and Human Services Claims Officer, Washington, D.C. 20201.

[32 FR 14101, Oct. 11, 1967, as amended at 35 FR 4517, Mar. 13, 1970]

§ 35.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest which is the subject of the claim, his duly authorized agent, or his legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or his legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under applicable state law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually, as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, he shall present with his claim appropriate evidence that he has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

§ 35.4 Administrative claims; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payments for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed or designated by the Department or the constituent organization. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that claimant has, upon request, furnished the report referred to in the first sentence of this subparagraph and has made or agrees to make available to the Department or the operating agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected duration of and expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, market value of the property as of date of damage, and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing either on the responsibility of the United States for the injury to or loss of property or the damages claimed.

(d) *Time limit.* All evidence required to be submitted by this section shall be furnished by the claimant within a reasonable time. Failure of a claimant to furnish evidence necessary to a determination of his claim within three months after a request therefor has been mailed to his last known address may be deemed an abandonment of the claim. The claim may be thereupon disallowed.

§ 35.5 Investigation, examination, and determination of claims.

When a claim is received, the constituent agency out of whose activities the claim arose shall make such investigation as may be necessary or appropriate for a determination of the validity of the claim and thereafter shall forward the claim, together with all pertinent material, and a recommendation based on the merits of the case, with regard to allowance or disallowance of the claim, to the Department Claims Officer to whom authority has been delegated to adjust, determine, compromise and settle all claims hereunder.

§ 35.6 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the Department's action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period after the date of mailing, by certified or registered mail of notice of final denial of the claim as provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the Department for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the Department shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) to bring suit shall not accrue until 6 months after the filing of a request for reconsideration. Final Department action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

[32 FR 14101, Oct. 11, 1967, as amended at 35 FR 4517, Mar. 13, 1970]

§ 35.7 Payment of approved claims.

(a) Upon allowance of his claim, claimant or his duly authorized agent shall sign the voucher for payment, Standard Form 1145, before payment is made.

(b) When the claimant is represented by an attorney, the voucher for payment (SF 1145) shall designate both the claimant and his attorney as "payees." The check shall be delivered to the attorney whose address shall appear on the voucher.

§ 35.8 Release.

Acceptance by the claimant, his agent or legal representative, of any award, compromise or settlement made hereunder, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 35.9 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment of not more than 5 years, or both (18 U.S.C. 287.1001), and, in addition, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C. 231).

§ 35.10 Limitation on Department's authority.

(a) An award, compromise or settlement of a claim hereunder in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised or settled hereunder only after consultation with the Department of Justice when, in the opinion of the Department:

(1) A new precedent or a new point of law is involved; or

(2) A question of policy is or may be involved; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and the Department is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised or settled only after consultation with the Department of Justice when it is learned that the United States or an employee, agent or cost plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

PART 46—PROTECTION OF HUMAN SUBJECTS

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AUTHORITY: 5 U.S.C. 301; sec. 474(a), 88 Stat. 352 (42 U.S.C. 289*l*-3(a)), unless otherwise noted.

Subpart A—Basic HHS Policy for Protection of Human Research Subjects

SOURCE: 46 FR 8386, Jan. 26, 1981.

§ 46.101 To what do these regulations apply?

(a) Except as provided in paragraph (b) of this section, this subpart applies to all research involving human subjects conducted by the Department of Health and Human Services or funded in whole or in part by a Department grant, contract, cooperative agreement or fellowship.

(1) This includes research conducted by Department employees, except each Principal Operating Component head may adopt such nonsubstantive, procedural modifications as may be appropriate from an administrative standpoint.

(2) It also includes research conducted or funded by the Department of Health and Human Services outside the United States, but in appropriate circumstances, the Secretary may, under paragraph (e) of this section waive the applicability of some or all of the requirements of these regulations for research of this type.

(b) Research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from these regulations unless the research is covered by other subparts of this part:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), if information taken from these sources is recorded in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(3) Research involving survey or interview procedures, except where all of the following conditions exist: (i) responses are recorded in such a manner that the human subjects can be identified, directly or through identifiers linked to the subjects, (ii) the subject's responses, if they became known outside the research, could reasonably place the subject at risk of criminal or civil liability or be damaging to the subject's financial standing or employability, and (iii) the research deals with sensitive aspects of the subject's own behavior, such as illegal conduct, drug use, sexual behavior, or use of alcohol. All research involving survey or interview procedures is exempt, without exception, when the respondents are elected or appointed public officials or candidates for public office.

(4) Research involving the observation (including observation by participants) of public behavior, except where all of the following conditions exist: (i) observations are recorded in such a manner that the human subjects can be identified, directly or through identifiers linked to the subjects, (ii) the observations recorded about the individual, if they became known outside the research, could reasonably place the subject at risk of criminal or civil liability or be damaging to the subject's financial standing or employability, and (iii) the research deals with sensitive aspects of the subject's own behavior such as illegal con-

duct, drug use, sexual behavior, or use of alcohol.

(5) Research involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(c) The Secretary has final authority to determine whether a particular activity is covered by these regulations.

(d) The Secretary may require that specific research activities or classes of research activities conducted or funded by the Department, but not otherwise covered by these regulations, comply with some or all of these regulations.

(e) The Secretary may also waive applicability of these regulations to specific research activities or classes of research activities, otherwise covered by these regulations. Notices of these actions will be published in the FEDERAL REGISTER as they occur.

(f) No individual may receive Department funding for research covered by these regulations unless the individual is affiliated with or sponsored by an institution which assumes responsibility for the research under an assurance satisfying the requirements of this part, or the individual makes other arrangements with the Department.

(g) Compliance with these regulations will in no way render inapplicable pertinent federal, state, or local laws or regulations.

(h) Each subpart of these regulations contains a separate section describing to what the subpart applies. Research which is covered by more than one subpart shall comply with all applicable subparts.

[46 FR 8386, Jan. 26, 1981; 46 FR 19195, Mar. 27, 1981]

§ 46.102 Definitions.

(a) "Secretary" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom authority has been delegated.

(b) "Department" or "HHS" means the Department of Health and Human Services.

(c) "Institution" means any public or private entity or agency (including federal, state, and other agencies).

(d) "Legally authorized representative" means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(e) "Research" means a systematic investigation designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute "research" for purposes of these regulations, whether or not they are supported or funded under a program which is considered research for other purposes. For example, some "demonstration" and "service" programs may include research activities.

(f) "Human subject" means a living individual about whom an investigator (whether professional or student) conducting research obtains (1) data through intervention or interaction with the individual, or (2) identifiable private information. "Intervention" includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. "Interaction" includes communication or interpersonal contact between investigator and subject. "Private information" includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) "Minimal risk" means that the risks of harm anticipated in the proposed research are not greater, considering probability and magnitude, than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(h) "Certification" means the official notification by the institution to the Department in accordance with the requirements of this part that a research project or activity involving human subjects has been reviewed and approved by the Institutional Review Board (IRB) in accordance with the approved assurance on file at HHS. (Certification is required when the research is funded by the Department and not otherwise exempt in accordance with § 46.101(b)).

[46 FR 8386, Jan 26, 1981; 46 FR 19195, Mar. 27, 1981]

§ 46.103 Assurances.

(a) Each institution engaged in research covered by these regulations shall provide written assurance satisfactory to the Secretary that it will comply with the requirements set forth in these regulations.

(b) The Department will conduct or fund research covered by these regulations only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the Secretary that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. This assurance shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of source of funding. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of these regulations applicable to Department-funded research and is not applicable to any research in an exempt category listed in § 46.101.

(2) Designation of one or more IRBs established in accordance with the requirements of this subpart, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.

(3) A list of the IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the Secretary. [1]

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; (iii) for insuring prompt reporting to the IRB of proposed changes in a research activity, and for insuring that changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except where necessary to eliminate apparent immediate hazards to the subject; and (iv) for insuring prompt reporting to the IRB and to the Secretary [1] of unanticipated problems involving risks to subjects or others.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by these regulations, and shall be filed in such form and manner as the Secretary may prescribe.

(d) The Secretary will evaluate all assurances submitted in accordance with these regulations through such officers and employees of the Department and such experts or consultants engaged for this purpose as the Secretary determines to be appropriate. The Secretary's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

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[1] Reports should be filed with the Office for Protection from Research Risks, National Institutes of Health, Department of Health and Human Services, Bethesda, Maryland 20205.

(e) On the basis of this evaluation, the Secretary may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The Secretary may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Within 60 days after the date of submission to HHS of an application or proposal, an institution with an approved assurance covering the proposed research shall certify that the application or proposal has been reviewed and approved by the IRB. Other institutions shall certify that the application or proposal has been approved by the IRB within 30 days after receipt of a request for such a certification from the Department. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

§§ 46.104—46.106 [Reserved]

§ 46.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members' backgrounds including consideration of the racial and cultural backgrounds of members and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, including but not limited to subjects covered by other subparts of this part, the IRB shall include one or more individuals who are primarily concerned with the welfare of these subjects.

(b) No IRB may consist entirely or men or entirely of women, or entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in nonscientific areas; for example: lawyers, ethicists, members of the clergy.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participating in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of complex issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 46.108 IRB functions and operations.

In order to fulfill the requirements of these regulations each IRB shall:

(a) Follow written procedures as provided in § 46.103(b)(4).

(b) Except when an expedited review procedure is used (see § 46.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

(c) Be responsible for reporting to the appropriate institutional officials and the Secretary[1] any serious or continuing noncompliance by investigators with the requirements and determinations of the IRB.

[46 FR 8386, Jan. 26, 1981; 46 FR 19195, Mar. 27, 1981]

§ 46.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by these regulations.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with § 46.116. The IRB may require that information, in addition to that specifically mentioned in § 46.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with § 46.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by these regulations at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

§ 46.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary has established, and published in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate, through periodic republication in the FEDERAL REGISTER.

(b) An IRB may review some or all of the research appearing on the list through an expedited review procedure, if the research involves no more than minimal risk. The IRB may also use the expedited review procedure to review minor changes in previously approved research during the period for which approval is authorized. Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in § 46.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals which have been approved under the procedure.

(d) The Secretary may restrict, suspend, or terminate an institution's or IRB's use of the expedited review procedure when necessary to protect the rights or welfare of subjects.

§ 46.111 Criteria for IRB approval of research.

(a) In order to approve research covered by these regulations the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already

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[1] Reports should be filed with the Office for Protection from Research Risks, National Institutes of Health, Department of Health and Human Services, Bethesda, Maryland 20205.

being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by § 46.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by § 46.117.

(6) Where appropriate, the research plan makes adequate provision for monitoring the data collected to insure the safety of subjects.

(7) Where appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) Where some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as persons with acute or severe physical or mental illness, or persons who are economically or educationally disadvantaged, appropriate additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 46.112 Review by institution.

Research covered by these regulations that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 46.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the Secretary.[1]

[46 FR 8386, Jan. 26, 1981; 46 FR 19195, Mar. 27, 1981]

§ 46.114 Cooperative research.

Cooperative research projects are those projects, normally supported through grants, contracts, or similar arrangements, which involve institutions in addition to the grantee or prime contractor (such as a contractor with the grantee, or a subcontractor with the prime contractor). In such instances, the grantee or prime contractor remains responsible to the Department for safeguarding the rights and welfare of human subjects. Also, when cooperating institutions conduct some or all of the research involving some or all of these subjects, each cooperating institution shall comply with these regulations as though it received funds for its participation in the project directly from the Department, except that in complying with these regulations institutions may use joint review, reliance upon the review of another qualified IRB, or similar arrangements aimed at avoidance of duplication of effort.

§ 46.115 IRB records.

(a) An institution, or where appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

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[1] Reports should be filed with the Office for Protection from Research Risks, National Institutes of Health, Department of Health and Human Services, Bethesda, Maryland 20205.

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members as required by § 46.103(b)(3).

(6) Written procedures for the IRB as required by § 46.103(b)(4).

(7) Statements of significant new findings provided to subjects, as required by § 46.116(b)(5).

(b) The records required by this regulation shall be retained for at least 3 years after completion of the research, and the records shall be accessible for inspection and copying by authorized representatives of the Department at reasonable times and in a reasonable manner.

[46 FR 8386, Jan. 26, 1981; 46 FR 19195, Mar. 27, 1981]

§ 46.116 General requirements for informed consent.

Except as provided elsewhere in this or other subparts, no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research is to be conducted for the purpose of demonstrating or evaluating: (i) Federal, state, or local benefit or service programs which are not themselves research programs, (ii) procedures for obtaining benefits or services under these programs, or (iii) possible changes in or alternatives to these programs or procedures; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in these regulations are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in these regulations is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

[46 FR 8386, Jan. 26, 1981; 46 FR 29883, June 3, 1981]

§ 46.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.

(b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by § 46.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A "short form" written consent document stating that the elements of informed consent required by § 46.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall

approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the "short form."

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases where the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

§ 46.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to the Department with the knowledge that subjects may be involved within the period of funding, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants (including bloc grants) where selection of specific projects is the institution's responsibility; research training grants where the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research described in § 46.101(b), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in these regulations, and certification submitted to the Department.

§ 46.119 Research undertaken without the intention of involving human subjects.

In the event research (conducted or funded by the Department) is undertaken without the intention of involving human subjects, but it is later proposed to use human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in these regulations, a certification submitted to the Department, and final approval given to the proposed change by the Department.

§ 46.120 Evaluation and disposition of applications and proposals.

(a) The Secretary will evaluate all applications and proposals involving human subjects submitted to the Department through such officers and employees of the Department and such experts and consultants as the Secretary determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the proposed research to the subjects and others, and the importance of the knowledge to be gained.

(b) On the basis of this evaluation, the Secretary may approve or disapprove the application or proposal, or enter into negotations to develop an approvable one.

§ 46.121 Investigational new drug or device 30-day delay requirement.

When an institution is required to prepare or to submit a certification with an application or proposal under these regulations, and the application or proposal involves an investigational new drug (within the meaning of 21 U.S.C. 355(i) or 357(d)) or a significant risk device (as defined in 21 CFR 812.3(m)), the institution shall identify the drug or device in the certification. The institution shall also state whether the 30-day interval required for investigational new drugs by 21 CFR 312.1(a) and for significant risk devices by 21 CFR 812.30 has elapsed, or whether the Food and Drug Administration has waived that requirement. If the 30-day interval has expired, the institution shall state whether the Food and Drug Administration has requested that the sponsor continue to withhold or restrict the use of the drug or device in human subjects. If the 30-day interval has not expired, and a waiver has not been received, the institution shall send a statement to the Department upon expiration of the interval. The Department will not consider a certification acceptable until the institution has submitted a statement that the 30-day interval has elapsed, and the Food and Drug Administration has not requested it to limit the use of the drug or device, or that the Food and Drug Administration has waived the 30-day interval.

§ 46.122 Use of Federal funds.

Federal funds administered by the Department may not be expended for research involving human subjects unless the requirements of these regulations, including all subparts of these regulations, have been satisfied.

§ 46.123 Early termination of research funding; evaluation of subsequent applications and proposals.

(a) The Secretary may require that Department funding for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the Secretary finds an institution has materially failed to comply with the terms of these regulations.

(b) In making decisions about funding applications or proposals covered by these regulations the Secretary may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person who would direct the scientific and technical aspects of an activity has in the judgment of the Secretary materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not Department funds were involved).

§ 46.124 Conditions.

With respect to any research project or any class of research projects the Secretary may impose additional conditions prior to or at the time of funding when in the Secretary's judgment additional conditions are necessary for the protection of human subjects.

Subpart B—Additional Protections Pertaining to Research, Development, and Related Activities Involving Fetuses, Pregnant Women, and Human in Vitro Fertilization

SOURCE: 40 FR 33528, Aug. 8, 1975, unless otherwise noted.

§ 46.201 Applicability.

(a) The regulations in this subpart are applicable to all Department of Health and Human Services grants and contracts supporting research, development, and related activities involving: (1) The fetus, (2) pregnant women, and (3) human *in vitro* fertilization.

(b) Nothing in this subpart shall be construed as indicating that compliance with the procedures set forth herein will in any way render inapplicable pertinent State or local laws bearing upon activities covered by this subpart.

(c) The requirements of this subpart are in addition to those imposed under the other subparts of this part.

§ 46.202 Purpose.

It is the purpose of this subpart to provide additional safeguards in reviewing activities to which this subpart is applicable to assure that they conform to appropriate ethical standards and relate to important societal needs.

§ 46.203 Definitions.

As used in this subpart:

(a) "Secretary" means the Secretary of Health and Human Services and any other officer or employee of the

Department of Health and Human Services to whom authority has been delegated.

(b) "Pregnancy" encompasses the period of time from confirmation of implantation (through any of the presumptive signs of pregnancy, such as missed menses, or by a medically acceptable pregnancy test), until expulsion or extraction of the fetus.

(c) "Fetus" means the product of conception from the time of implantation (as evidenced by any of the presumptive signs of pregnancy, such as missed menses, or a medically acceptable pregnancy test), until a determination is made, following expulsion or extraction of the fetus, that it is viable.

(d) "Viable" as it pertains to the fetus means being able, after either spontaneous or induced delivery, to survive (given the benefit of available medical therapy) to the point of independently maintaining heart beat and respiration. The Secretary may from time to time, taking into account medical advances, publish in the FEDERAL REGISTER guidelines to assist in determining whether a fetus is viable for purposes of this subpart. If a fetus is viable after delivery, it is a premature infant.

(e) "Nonviable fetus" means a fetus *ex utero* which, although living, is not viable.

(f) "Dead fetus" means a fetus *ex utero* which exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord (if still attached).

(g) *"In vitro* fertilization" means any fertilization of human ova which occurs outside the body of a female, either through admixture of donor human sperm and ova or by any other means.

[40 FR 33528, Aug. 8, 1975, as amended at 43 FR 1759, Jan. 11, 1978]

§ 46.204 Ethical Advisory Boards.

(a) One or more Ethical Advisory Boards shall be established by the Secretary. Members of these board(s) shall be so selected that the board(s) will be competent to deal with medical, legal, social, ethical, and related issues and may include, for example, research scientists, physicians, psychologists, sociologists, educators, lawyers, and ethicists, as well as representatives of the general public. No board member may be a regular, full-time employee of the Department of Health and Human Services.

(b) At the request of the Secretary, the Ethical Advisory Board shall render advice consistent with the policies and requirements of this Part as to ethical issues, involving activities covered by this subpart, raised by individual applications or proposals. In addition, upon request by the Secretary, the Board shall render advice as to classes of applications or proposals and general policies, guidelines, and procedures.

(c) A Board may establish, with the approval of the Secretary, classes of applications or proposals which: (1) Must be submitted to the Board, or (2) need not be submitted to the Board. Where the Board so establishes a class of applications or proposals which must be submitted, no application or proposal within the class may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Board and the Board has rendered advice as to its acceptability from an ethical standpoint.

(d) No application or proposal involving human *in vitro* fertilization may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Ethical Advisory Board and the Board has rendered advice as to its acceptability from an ethical standpoint.

[40 FR 33528, Aug. 8, 1975, as amended at 43 FR 1759, Jan. 11, 1978]

§ 46.205 Additional duties of the Institutional Review Boards in connection with activities involving fetuses, pregnant women, or human in vitro fertilization.

(a) In addition to the responsibilities prescribed for Institutional Review Boards under Subpart A of this part, the applicant's or offeror's Board shall, with respect to activities covered by this subpart, carry out the following additional duties:

(1) Determine that all aspects of the activity meet the requirements of this subpart;

(2) Determine that adequate consideration has been given to the manner in which potential subjects will be selected, and adequate provision has been made by the applicant or offeror for monitoring the actual informed consent process (e.g., through such mechanisms, when appropriate, as participation by the Institutional Review Board or subject advocates in: (i) Overseeing the actual process by which individual consents required by this subpart are secured either by approving induction of each individual into the activity or verifying, perhaps through sampling, that approved procedures for induction of individuals into the activity are being followed, and (ii) monitoring the progress of the activity and intervening as necessary through such steps as visits to the activity site and continuing evaluation to determine if any unanticipated risks have arisen);

(3) Carry out such other responsibilities as may be assigned by the Secretary.

(b) No award may be issued until the applicant or offeror has certified to the Secretary that the Institutional Review Board has made the determinations required under paragraph (a) of this section and the Secretary has approved these determinations, as provided in § 46.120 of Subpart A of this part.

(c) Applicants or offerors seeking support for activities covered by this subpart must provide for the designation of an Institutional Review Board, subject to approval by the Secretary, where no such Board has been established under Subpart A of this part.

[40 FR 33528, Aug. 8, 1975, as amended at 46 FR 8386, Jan. 26, 1981]

§ 46.206 General limitations.

(a) No activity to which this subpart is applicable may be undertaken unless:

(1) Appropriate studies on animals and nonpregnant individuals have been completed;

(2) Except where the purpose of the activity is to meet the health needs of the mother or the particular fetus, the risk to the fetus is minimal and, in all cases, is the least possible risk for achieving the objectives of the activity.

(3) Individuals engaged in the activity will have no part in: (i) Any decisions as to the timing, method, and procedures used to terminate the pregnancy, and (ii) determining the viability of the fetus at the termination of the pregnancy; and

(4) No procedural changes which may cause greater than minimal risk to the fetus or the pregnant woman will be introduced into the procedure for terminating the pregnancy solely in the interest of the activity.

(b) No inducements, monetary or otherwise, may be offered to terminate pregnancy for purposes of the activity.

[40 FR 33528, Aug. 8, 1975, as amended at 40 FR 51638, Nov. 6, 1975]

§ 46.207 Activities directed toward pregnant women as subjects.

(a) No pregnant woman may be involved as a subject in an activity covered by this subpart unless: (1) The purpose of the activity is to meet the health needs of the mother and the fetus will be placed at risk only to the minimum extent necessary to meet such needs, or (2) the risk to the fetus is minimal.

(b) An activity permitted under paragraph (a) of this section may be conducted only if the mother and father are legally competent and have given their informed consent after having been fully informed regarding possible impact on the fetus, except that the father's informed consent need not be secured if: (1) The purpose of the activity is to meet the health needs of the mother; (2) his identity or whereabouts cannot reasonably be ascertained; (3) he is not reasonably available; or (4) the pregnancy resulted from rape.

§ 46.208 Activities directed toward fetuses in utero as subjects.

(a) No fetus *in utero* may be involved as a subject in any activity covered by this subpart unless: (1) The purpose of the activity is to meet the health needs of the particular fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs, or (2) the risk to the fetus imposed by the research is minimal and the purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means.

(b) An activity permitted under paragraph (a) of this section may be conducted only if the mother and father are legally competent and have given their informed consent, except that the father's consent need not be secured if: (1) His identity or whereabouts cannot reasonably be ascertained, (2) he is not reasonably available, or (3) the pregnancy resulted from rape.

§ 46.209 Activities directed toward fetuses ex utero, including nonviable fetuses, as subjects.

(a) Until it has been ascertained whether or not a fetus ex utero is viable, a fetus ex utero may not be involved as a subject in an activity covered by this subpart unless:

(1) There will be no added risk to the fetus resulting from the activity, and the purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means, or

(2) The purpose of the activity is to enhance the possibility of survival of the particular fetus to the point of viability.

(b) No nonviable fetus may be involved as a subject in an activity covered by this subpart unless:

(1) Vital functions of the fetus will not be artificially maintained,

(2) Experimental activities which of themselves would terminate the heartbeat or respiration of the fetus will not be employed, and

(3) The purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means.

(c) In the event the fetus *ex utero* is found to be viable, it may be included as a subject in the activity only to the extent permitted by and in accordance with the requirements of other subparts of this part.

(d) An activity permitted under paragraph (a) or (b) of this section may be conducted only if the mother and father are legally competent and have given their informed consent, except that the father's informed consent need not be secured if: (1) his identity or whereabouts cannot reasonably be ascertained, (2) he is not reasonably available, or (3) the pregnancy resulted from rape.

[40 FR 33528, Aug. 8, 1975, as amended at 43 FR 1759, Jan. 11, 1978]

§ 46.210 Activities involving the dead fetus, fetal material, or the placenta.

Activities involving the dead fetus, mascerated fetal material, or cells, tissue, or organs excised from a dead fetus shall be conducted only in accordance with any applicable State or local laws regarding such activities.

§ 46.211 Modification or waiver of specific requirements.

Upon the request of an applicant or offeror (with the approval of its Institutional Review Board), the Secretary may modify or waive specific requirements of this subpart, with the approval of the Ethical Advisory Board after such opportunity for public comment as the Ethical Advisory Board considers appropriate in the particular instance. In making such decisions, the Secretary will consider whether the risks to the subject are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant such modification or waiver and that such benefits cannot be gained except through a modification or waiver. Any such modifications or waivers will be published as notices in the FEDERAL REGISTER.

Subpart C—Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects

SOURCE: 43 FR 53655, Nov. 16, 1978, unless otherwise noted.

§ 46.301 Applicability.

(a) The regulations in this subpart are applicable to all biomedical and behavioral research conducted or supported by the Department of Health and Human Services involving prisoners as subjects.

(b) Nothing in this subpart shall be construed as indicating that compliance with the procedures set forth herein will authorize research involving prisoners as subjects, to the extent such research is limited or barred by applicable State or local law.

(c) The requirements of this subpart are in addition to those imposed under the other subparts of this part.

§ 46.302 Purpose.

Inasmuch as prisoners may be under constraints because of their incarceration which could affect their ability to make a truly voluntary and uncoerced decision whether or not to participate as subjects in research, it is the purpose of this subpart to provide additional safeguards for the protection of prisoners involved in activities to which this subpart is applicable.

§ 46.303 Definitions.

As used in this subpart:

(a) "Secretary" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom authority has been delegated.

(b) "DHHS" means the Department of Health and Human Services.

(c) "Prisoner" means any individual involuntarily confined or detained in a penal institution. The term is intended to encompass individuals sentenced to such an institution under a criminal or civil statute, individuals detained in other facilities by virtue of statutes or commitment procedures which provide alternatives to criminal prosecution or incarceration in a penal institution, and individuals detained pending arraignment, trial, or sentencing.

(d) "Minimal risk" is the probability and magnitude of physical or psychological harm that is normally encountered in the daily lives, or in the routine medical, dental, or psychological examination of healthy persons.

§ 46.304 Composition of Institutional Review Boards where prisoners are involved.

In addition to satisfying the requirements in § 46.107 of this part, an Institutional Review Board, carrying out responsibilities under this part with respect to research covered by this subpart, shall also meet the following specific requirements:

(a) A majority of the Board (exclusive of prisoner members) shall have no association with the prison(s) involved, apart from their membership on the Board.

(b) At least one member of the Board shall be a prisoner, or a prisoner representative with appropriate background and experience to serve in that capacity, except that where a particular research project is reviewed by more than one Board only one Board need satisfy this requirement.

[43 FR 53655, Nov. 16, 1978, as amended at 46 FR 8386, Jan. 26, 1981]

§ 46.305 Additional duties of the Institutional Review Boards where prisoners are involved.

(a) In addition to all other responsibilities prescribed for Institutional Review Boards under this part, the Board shall review research covered by this subpart and approve such research only if it finds that:

(1) The research under review represents one of the categories of research permissible under § 46.306(a)(2);

(2) Any possible advantages accruing to the prisoner through his or her participation in the research, when compared to the general living conditions, medical care, quality of food, amenities and opportunity for earnings in the prison, are not of such a magnitude that his or her ability to weigh the risks of the research against the value of such advantages in the limited choice environment of the prison is impaired;

(3) The risks involved in the research are commensurate with risks that would be accepted by nonprisoner volunteers;

(4) Procedures for the selection of subjects within the prison are fair to all prisoners and immune from arbitrary intervention by prison authorities or prisoners. Unless the principal investigator provides to the Board justification in writing for following some other procedures, control subjects must be selected randomly from the

group of available prisoners who meet the characteristics needed for that particular research project;

(5) The information is presented in language which is understandable to the subject population;

(6) Adequate assurance exists that parole boards will not take into account a prisoner's participation in the research in making decisions regarding parole, and each prisoner is clearly informed in advance that participation in the research will have no effect on his or her parole; and

(7) Where the Board finds there may be a need for follow-up examination or care of participants after the end of their participation, adequate provision has been made for such examination or care, taking into account the varying lengths of individual prisoners' sentences, and for informing participants of this fact.

(b) The Board shall carry out such other duties as may be assigned by the Secretary.

(c) The institution shall certify to the Secretary, in such form and manner as the Secretary may require, that the duties of the Board under this section have been fulfilled.

§ 46.306 Permitted research involving prisoners.

(a) Biomedical or behavioral research conducted or supported by DHHS may involve prisoners as subjects only if:

(1) The institution responsible for the conduct of the research has certified to the Secretary that the Institutional Review Board has approved the research under § 46.305 of this subpart; and

(2) In the judgment of the Secretary the proposed research involves solely the following:

(A) Study of the possible causes, effects, and processes of incarceration, and of criminal behavior, provided that the study presents no more than minimal risk and no more than inconvenience to the subjects;

(B) Study of prisons as institutional structures or of prisoners as incarcerated persons, provided that the study presents no more than minimal risk and no more than inconvenience to the subjects;

(C) Research on conditions particularly affecting prisoners as a class (for example, vaccine trials and other research on hepatitis which is much more prevalent in prisons than elsewhere; and research on social and psychological problems such as alcoholism, drug addiction and sexual assaults) provided that the study may proceed only after the Secretary has consulted with appropriate experts including experts in penology medicine and ethics, and published notice, in the Federal Register, of his intent to approve such research; or

(D) Research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health or well-being of the subject. In cases in which those studies require the assignment of prisoners in a manner consistent with protocols approved by the IRB to control groups which may not benefit from the research, the study may proceed only after the Secretary has consulted with appropriate experts, including experts in penology medicine and ethics, and published notice, in the Federal Register, of his intent to approve such research.

(b) Except as provided in paragraph (a) of this section, biomedical or behavioral research conducted or supported by DHHS shall not involve prisoners as subjects.

PART 50—U.S. EXCHANGE VISITOR PROGRAM—REQUEST FOR WAIVER OF THE TWO-YEAR FOREIGN RESIDENCE REQUIREMENT

Sec.
50.1 Authority.
50.2 Exchange Visitor Waiver Review Board.
50.3 Policy.
50.4 Procedure for submission of application to DHHS.
50.5 Personal hardship, persecution and visa extension considerations.
50.6 Release from foreign government.

Authority: 75 Stat. 527, 22 U.S.C. 2451 et seq.; 84 Stat. 116, 8 U.S.C. 1182(e).

Source: 41 FR 8171, Feb. 25, 1976, unless otherwise noted.

§ 50.1 Authority.

Under the authority of the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 527) and the Immigration and Nationality Act as amended (84 Stat. 116), the Department of Health and Human Services is an "interested United States Government agency" with the authority to submit requests through the Department of State to the Attorney General for the waiver of the two-year foreign residence requirement for exchange visitors under the Mutual Educational and Cultural Exchange Program.

§ 50.2 Exchange Visitor Waiver Review Board.

(a) *Establishment.* The Exchange Visitor Waiver Review Board is established for the purpose of carrying out the Department's responsibilities under the Exchange Visitor Program.

(b) *Functions.* The Exchange Visitor Waiver Review Board is responsible for making thorough and equitable evaluations of applications for waiver submitted to the Department and for rendering recommendations to the Department of State on such applications on behalf of the Secretary.

(c) *Membership.* The Exchange Visitor Waiver Review Board consists of not less than five members, of whom no less than three shall consider any particular application. The Special Assistant to the Secretary for International Affairs is an ex officio member of the Board and serves as Chairman of the Board. He may designate a staff member of the Office of the Secretary to serve as member and Chairman in his absence. Two regularly assigned members are appointed by the Assistant Secretary for Health to consider applications concerning health and related fields and two regularly assigned members are appointed by the Assistant Secretary for Education to consider applications concerning education or training and related fields. The Board may be expanded to include members from other appropriate operating components of the Department when necessary in order to consider an application in other fields of interest to the Department (e.g. welfare, social security or rehabilitation). When, in the Board's judgment, it is required, the Board may obtain expert advisory opinion from other sources.

§ 50.3 Policy.

(a) *Criteria and information pertaining to waivers.* The Department of Health and Human Services has a stringent and restrictive policy with respect to requesting waivers for foreign visitors under the exchange visitor program. Each case is evaluated individually on the basis of the facts available. The general criteria which are applied are:

(1) The program or activity of the applicant institution or organization in which the exchange visitor is employed must be of high priority and significance in an area of interest to the Department. The Waiver Review Board will not request a waiver when the documentation clearly demonstrates that the problem is primarily one of recruitment in order to overcome a local community or institutional manpower shortage, however serious.

(2) The exchange visitor must be needed as an integral part of the program or activity, or of an essential component thereof. The Board will not request a waiver when the principal problem appears to be one of administrative or program inconvenience to the institution or other employer.

(3) The exchange visitor must possess outstanding qualifications, training, and experience. The Board will not request a waiver simply because an individual has specialized training or experience or is occupying a senior staff position in a university, hospital, or other institution.

(b) *Waivers for members of exchange visitor's family.* (1) Where a decision is made to request a waiver for an exchange visitor, a waiver will also be requested for the spouse and children, if any, if they are also subject to the foreign residence requirement.

(2) In cases of married couples where one spouse is an exchange visitor, the subject of a waiver application, and the other is a citizen of the United States or resident alien, a waiver will be requested for the exchange visitor if either spouse is found to meet the strict criteria given above.

§ 50.4 Procedure for submission of application to DHHS.

(a) The applicant institution (educational institution, hospital, laboratory, corporation, etc.) should send a completed application (HHS Form 426) to the Executive Secretary, Exchange Visitor Waiver Review Board, Department of Health and Human Services, Washington, D.C. 20201. Application forms and information may be obtained from the Executive Secretary. The application must be signed by an authorized official of the applicant institution. The information should describe in detail the circumstances of the case involved. This should include but not be limited to:

(1) A complete description of the program or activity in which the exchange visitor is engaged; including factual evidence of the way in which the program or activity serves the national or international public interest.

(2) His or her relationship to the program, particular contribution, and other responsibilities, if any.

(3) The probable future of the program if the waiver is not granted; including specific evidence showing how the loss of the exchange visitor's services would seriously restrain the initiation, continuation, completion, or success of the program or activity, or a major part thereof.

(4) The applicant institution's long-range plans for the exchange visitor, and ways in which the visitor will contribute in the future to the activities in which he or she is employed.

(5) Specific evidence of a demonstrated unique capability of the exchange visitor to make essential contributions to the program or activity over a long period of time.

(6) The exchange visitor's curriculum vitae, bibliography, data and place of birth, present citizenship, date and port of entry and current address.

(7) Any other facts considered germane.

(b) Since the formal filing of an application for waiver with the Immigration and Naturalization Service automatically terminates the applicant's exchange visitor status, it is permissible to obtain the decision of the Exchange Visitor Waiver Review Board before filing with the Immigration and Naturalization Service.

§ 50.5 Personal hardship, persecution and visa extension considerations.

(a) The Department is not responsible for considering applications for waivers based on:

(1) Exceptional hardship to the exchange visitor's American or legally resident alien spouse or child; or

(2) The alien's unwillingness to return to the country of his/her nationality or last residence on the grounds that he/she or family members would be subject to persecution on account of race, religion or political opinion.

(b) Likewise, this Department is not responsible for considering requests for extension of visa.

(c) Inquiries concerning the above should be directed to the District Office of the Immigration and Naturalization Service which has jurisdiction over the exchange visitor's place of residence in the U.S.

§ 50.6 Release from foreign government.

The Department of State has the responsibility to consider applications for waivers which are based on a notification from the exchange visitor's country that it has no objection to a waiver (22 CFR 63.31).

PART 57—VOLUNTEER SERVICES

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57.2 Definitions.
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57.4 Acceptance and use of volunteer services.
57.5 Services and benefits available to volunteers.

AUTHORITY: Sec. 223, 58 Stat. 683, as amended by 81 Stat. 539: 42 U.S.C. 217b.

SOURCE: 34 FR 13868, Aug. 29, 1969, unless otherwise noted.

§ 57.1 Applicability.

The regulations in this part apply to the acceptance of volunteer and uncompensated services for use in the operation of any health care facility of the Department or in the provision of health care.

§ 57.2 Definitions.

As used in the regulations in this part:

"Secretary" means the Secretary of Health and Human Services.

"Department" means the Department of Health and Human Services.

"Volunteer services" are services performed by individuals (hereafter called volunteers) whose services have been offered to the Government and accepted under a formal agreement on a without compensation basis for use in the operation of a health care facility or in the provision of health care.

"Health care" means services to patients in Department facilities, beneficiaries of the Federal Government, or individuals or groups for whom health services are authorized under the programs of the Department.

"Health care facility" means a hospital, clinic, health center, or other facility established for the purpose of providing health care.

§ 57.3 Volunteer service programs.

Programs for the use of volunteer services may be established by the Secretary, or his designe, to broaden and strengthen the delivery of health services, contribute to the comfort and well being of patients in Department hospitals or clinics, or expand the services required in the operation of a health care facility. Volunteers may be used to supplement, but not to take the place of, personnel whose services are obtained through the usual employment procedures.

§ 57.4 Acceptance and use of volunteer services.

The Secretary, or his designee, shall establish requirements for: Accepting volunteer services from individuals or groups of individuals, using volunteer services, giving appropriate recognition to volunteers, and maintaining records of volunteer services.

§ 57.5 Services and benefits available to volunteers.

(a) The following provisions of law may be applicable to volunteers whose services are offered and accepted under the regulations in this part:

(1) Subchapter I of chapter 81 of title 5 of the United States Code relating to medical services for work related injuries;

(2) Title 28 of the United States Code relating to tort claims;

(3) Section 7903 of title 5 of the United States Code relating to protective clothing and equipment; and

(4) Section 5703 of title 5 of the United States Code relating to travel and transportation expenses.

(b) Volunteers may also be provided such other benefits as are authorized by law or by administrative action of the Secretary or his designee.

PART 63—GRANT PROGRAMS ADMINISTERED BY THE OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION

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AUTHORITY: Sec. 602, Community Services Act (42 U.S.C. 2942); Sec. 1110, Social Security Act (42 U.S.C. 1310).

SOURCE: 40 FR 23295, May 29, 1975, unless otherwise noted.

Subpart A—General

§ 63.1 Purpose and scope.

(a) *Applicability.* Except to the extent inconsistent with an applicable Federal statute the regulations in this part apply to all grant awards of Federal assistance made by the Assistant Secretary for Planning and Evaluation or his designee, hereinafter referred to in this part as the Assistant Secretary. Such grants include those under section 232 of the Community Services Act (42 U.S.C. 2835), section 1110 of the Social Security Act (42 U.S.C. 1310), Section 392A of the Communications Act of 1934, and such other authority as may be delegated to the Assistant Secretary for policy research activities.

(b) *Exceptions to applicability.* The award and administration of contracts and cooperative agreements by the Assistant Secretary shall not be covered by this subchapter. Contracts entered into by the Assistant Secretary shall be subject to the regulations in 41 CFR Chapters 1 and 3. Generally, the Assistant Secretary will select between grant and contract procedures and instruments, both with regard to the solicitation process and with respect to unsolicited proposals, on the basis of criteria set forth in the proposed revision of 41 CFR 3-1.53 published at 39 FR 27469 at any subsequent revision thereof.

(c) *Objectives*—(1) *Policy Research.* The overall objective of policy research activities is to obtain information, as it relates to the mission of the Department of Health and Human Services, about the basic causes of and methods for preventing and eliminating poverty and dependency and about improved methods for delivering human resources services. Such information is obtained through the conduct of basic and applied research, statistical analyses, and demonstrations and evaluations which have demonstrated a high probability of impacting on the formulation or modification of major Departmental policies and programs.

(2) *Telecommunications Demonstrations.* The overall objective of the Telecommunications Demonstration Program is to promote the development of nonbroadcast telecommunications facilities and services for the transmission, distribution, and delivery of health, education, and social service information.

[40 FR 23295, May 29, 1975, as amended at 42 FR 36149, July 13, 1977]

§ 63.2 Eligibility for award.

(a) *Groups and organizations eligible.* Except where otherwise prohibited by law, any public or nonprofit private agency, institution, or organization which is found by the Assistant Secretary to be authorized and qualified by educational, scientific, or other relevant competence to carry out a proposed project in accordance with the regulations of this subchapter shall be eligible to receive a grant under this part.

(b) *Project eligible*—(1) *Policy Research.* Any project found by the Assistant Secretary to be a research, pilot, evaluation, or demonstration project within the meaning of this section and § 63.1 shall be eligible for an award. Eligible projects may include planning, policy modeling or research utilization studies; experiments; demonstrations; field investigations; statistical data collections or analyses; or other types of investigation or studies, or combinations thereof, and may either be limited to one aspect of a problem or subject, or may consist of two or more related problems or subjects for concurrent or consecutive investigation and may involve multiple disciplines, facilities, and resources.

(2) *Telecommunications Demonstrations.* Any projects which meet the special criteria in § 63.6(c) shall be eligible for a telecommunications demonstration grant.

[40 FR 23295, May 29, 1975, as amended at 42 FR 36149, July 13, 1977]

§ 63.3 Program announcements and solicitations.

(a) In each fiscal year the Assistant Secretary may from time to time solicit applications through one or more general or specialized program announcements. Such announcements will be published in the FEDERAL REGISTER as notices and will include:

(1) A clear statement of the type(s) of applications requested;

(2) A specified plan, time(s) of application, and criteria for reviewing and approving applications;

(3) Any grant terms or conditions of general applicability (other than those set forth in this part) which are necessary (i) to meet the statutory requirements of applicable legislation, (ii) to assure or protect the advancement of the project, or (iii) to conserve grant funds.

(b) Applications for grants: Any applicant eligible for grant assistance may submit on or before such cutoff date or dates as the Assistant Secretary may announce in program solicitations, an application containing such pertinent information and in accordance with the forms and instructions as prescribed herein and additional forms and instructions as may be specified by the Assistant Secretary. Such application shall be executed by the applicant or an official or representative of the applicant duly authorized to make such application. The Assistant Secretary may require any party eligible for assistance under this subchapter to submit a preliminary proposal for review and approval prior to the acceptance of an application submitted under these provisions.

(c) All applications and preliminary proposals should be addressed to:

Grants Officer, Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, 330 Independence Avenue, SW., Room 5027, Washington, D.C. 20201.

§ 63.4 Cooperative arrangements.

(a) Eligible parties may enter into cooperative arrangements with other eligible parties, including those in another State, to apply for assistance.

(b) A joint application made by two or more applicants for assistance under this subchapter may have separate budgets corresponding to the programs, services and activities performed by each of the joint applicants or may have a combined budget. If joint applications present separate budgets, the Assistant Secretary may make separate awards, or may award a single grant authorizing separate amounts for each of the joint applicants.

(c) In the case of each cooperative arrangement authorized under paragraph (a) of this section and receiving assistance, except where the Assistant Secretary makes separate awards under paragraph (b) of this section all such applicants (1) shall be deemed to be joint legal recipients of the grant award and (2) shall be jointly and severally responsible for administering the project assisted under such grant.

§ 63.5 Effective date of approved grant.

Federal financial participation is normally available only with respect to obligations incurred subsequent to the effective date of an approved project. The effective date of the project will be set forth in the notification of grant award. Grantees may be reimbursed for costs resulting from obligations incurred before the effective date of the grant award if such costs are authorized by the Assistant Secretary in the notification of grant award or subsequently in writing, and otherwise would be allowable as costs of the grant under the applicable regulations and grant terms and conditions.

§ 63.6 Evaluation of applications.

(a) *Review procedures.* All applications filed in accordance with § 63.3 shall be evaluated by the Assistant Secretary through officers, employees, and such experts or consultants engaged for this purpose as he/she determines are specially qualified in the areas of research pursued by this office. The evaluation criteria below will be supplemented each fiscal year by a program announcement outlining priorities and objectives for policy research, and by other general or specialized solicitations. Such supplements may modify the criteria in paragraphs (b) and (c) of this section to provide greater specificity or otherwise improve their applicability to a given announcement or solicitation.

(b) *Criteria for Evaluation of Policy Research Projects.* Review of applications under paragraph (a) of this section will take into account such factors as:

(1) Scientific merit and the significance of the project in relation to policy objectives;

(2) Feasibility of the project;

(3) Soundness of research design, statistical technique, and procedures and methodology;

(4) Theoretical and technical soundness of the proposed plan of operation including consideration of the extent to which:

(i) The objectives of the proposed project are sharply defined, clearly stated, and capable of being attained by the proposed procedures;

(ii) The objectives of the proposed project show evidence of contributing to the achievement of policy objectives;

(iii) Provisions are made for adequate evaluation of the effectiveness of the project and for determining the extent to which the objectives are accomplished; and

(iv) Appropriate provisions are made for satisfactory inservice training connected with project services.

(5) Expected potential for utilizing the results of the proposed project in other projects or programs for similar purposes;

(6) Sufficiency of size, scope, and duration of the project so as to secure productive results;

(7) Adequacy of qualifications and experience, including managerial, of personnel;

(8) Adequacy of facilities and other resources; and

(9) Reasonableness of estimated cost in relation to anticipated results.

(c) *Criteria for Evaluation of Telecommunications Demonstrations Projects.* Review of applications for Telecommunications Demonstrations grants will take into account such factors as are listed in paragraphs (c) (1) through (10) of this section. Each applicant must include in the application, prior to final evaluation by the Assistant Secretary, documentation indicating specifically and separately how and to what extent each of these criteria have been or will be met:

(1) That the project for which application is made demonstrates innovative methods or techniques of utilizing nonbroadcast telecommunications equipment or facilities to satisfy the purpose of this authority;

(2) That the project will have original research value which will demonstrate to other potential users that such methods or techniques are feasible and cost-effective;

(3) That the services to be provided are responsive to local needs as identified and assessed by the applicant;

(4) That the applicant has assessed existing telecommunications facilities (if any) in the proposed service area and explored their use of interconnection in conjunction with the project;

(5) That there is significant local commitment (e.g., evidence of support, participation, and contribution by local institutions and agencies) to the proposed project, indicating that it fulfills local needs, and gives some promise that operational systems will result from successful demonstrations and will be supported by service recipients or providers;

(6) That demonstrations and related activities assisted under this section will remain under the administration and control of the applicant;

(7) That the applicant has the managerial and technical capability to carry out the project for which the application is made;

(8) That the facilities and equipment acquired or developed pursuant to the applications will be used substantially for the transmission, distribution, and delivery of health, education, or social service information, and that use of such facilities and equipment may be shared among these and additional public or other services;

(9) That the provision has been made to submit a summary and factual evaluation of the results of the demonstration at least annually for each year in which funds are received, in the form of a report suitable for dissemination to groups representative of national health, education, and social service telecommunications interests; and,

(10) That the project has potential for stimulating cooperation and sharing among institutions and agencies, both within and across disciplines.

(d) *Applicant's performance on prior award.* Where the applicant has previously received an award from the Department of Health and Human Services, the applicant's compliance or noncompliance with requirements applicable to such prior award as reflected in past written evaluation reports, memoranda on performance, and completeness of required submissions: *Provided,* That in any case where the Assistant Secretary proposes to deny assistance based upon the applicant's noncompliance with requirements applicable to a prior award, he shall do so only after affording the applicant reasonable notice and an opportunity to rebut the proposed basis for denial of assistance.

[40 FR 23295, May 29, 1975, as amended at 42 FR 36149, July 13, 1977]

§ 63.7 Disposition of applications.

(a) *Approval, disapproval, or deferral.* On the basis of the review of an application pursuant to § 63.6 the Assistant Secretary will either (1) approve the application in whole or in part, for such amount of funds and subject to such conditions as he/she deems necessary or desirable for the completion of the approved project, (2) disapprove the application, or (3) defer action on the application for such reasons as lack of funds or a need for further review.

(b) *Notification of disposition.* The Assistant Secretary will notify the applicant in writing of the disposition of its application. A signed notification of grant award will be issued to notify the applicant of an approved project application.

§ 63.8 Supplemental regulations and grant conditions.

(a) *Grants under section 232 of the Community Services Act.* (1) Any grants awarded with funds appropriated under section 232 of the Community Services Act shall be subject to the following regulations issued by the Director of the Community Services Administration (formerly the Office of Economic Opportunity):

45 CFR 1060.2	(Income Poverty Guidelines.)
45 CFR 1060.3	(Limitation on Benefits to Those Voluntarily Poor.)
45 CFR 1067.1	(Suspension and Termination of Assistance.)
45 CFR 1068.6	(Grantee Compliance with IRS Requirements for Withheld Federal Income and Social Security Taxes.)
45 CFR 1069.1	(Employee Participation in Direct Action.)
45 CFR 1069.2	(Limitations with Respect to Unlawful Demonstrations, Rioting, and Civil Disturbances.)
45 CFR 1070.1	(Public Access to Grantee Information.)

No other portions of Chapter X of this title are applicable to such grants.

(2) Grants awarded with funds appropriated under section 232 of the Community Services Act shall also be subject to the applicable statutory requirements in sections 242, 243, and 244, and title VI of the Community Services Act. The Assistant Secretary will advise grantees of the nature of these requirements at or prior to the time of award.

(3) In the event that any provision of this part is inconsistent with a provision of law or a regulation referenced in paragraphs (a)(1) and (2) of this section with respect to any grant funded under section 232 of the Community Services Act, the provision of this part shall, to the extent of any such inconsistency, not be effective.

(b) *Grants under other statutory authority.* Grants awarded by the Assistant Secretary may be subject to regulations, other than those set forth in this part, which have been issued under the authority of statutes authorizing particular awards. In such a case, that fact will be set forth in the program announcement soliciting applications for such grants published in the FEDERAL REGISTER pursuant to § 63.3.

(c) *Other regulations applicable to grants under this part.* Federal financial assistance provided under this part shall be subject to the following additional regulations except as otherwise provided in this part:

(1) Part 74 of this title, establishing uniform administrative requirements and cost principles for grants by the Department of Health and Human Services.

(2) Part 80 of this title, effectuating the provisions of title VI of the Civil Rights Act of 1964; and

(3) Part 16 of this title, establishing a Departmental Grant Appeals Board for the resolution of specified post-award grant disputes.

Subpart B—Financial Provisions

§ 63.16 Scope of subpart.

This subpart sets forth supplemental financial provisions which apply to all grants awarded by the Assistant Secretary, except as specified in § 63.23 of this subpart.

[40 FR 23295, May 29, 1975, as amended at 42 FR 36149, July 13, 1977]

§ 63.17 Amount of award.

Federal assistance shall be provided only to meet allowable costs incurred by the award recipient in carrying out an approved project in accordance with the authorizing legislation and the regulations of this part.

§ 63.18 Limitations on costs.

The amount of the award shall be set forth in the grant award document. The total cost to the Government will not exceed the amount set forth in the grant award document or any modification thereof approved by the Assistant Secretary which meets the requirements of applicable statutes and regulations. The Government shall not be obligated to reimburse the grantee for costs incurred in excess of such amount unless and until the Assistant Secretary has notified the grantee in writing that such amount has been increased and has specified such increased amount in a revised grant award document. Such revised amount shall thereupon constitute the maximum cost to the Government for the performance of the grant.

§ 63.19 Budget revisions and minor deviations.

Pursuant to § 74.102(d) of this title, paragraphs (b)(3) and (b)(4) of that section are waived.

§ 63.20 Period during which grant funds may be obligated.

(a) The amount of the grant award shall remain available for obligation by the grantee during the period specified in the grant award or until otherwise terminated. Such period may be extended by revision of the grant with or without additional funds pursuant to paragraph (b) of this section where otherwise permitted by law.

(b) When it is determined that special or unusual circumstances will delay the completion of the project beyond the period for obligation, the grantee must in writing request the Assistant Secretary to extend such period and must indicate the reasons therefor.

§ 63.21 Obligation and liquidation by grantee.

Obligations will be considered to have been incurred by a grantee on the basis of documentary evidence of binding commitments for the acquisition of goods or property or for the performance of work, except that funds for personal services, for services performed by public utilities, for travel, and for the rental of facilities, shall be considered to have been obligated as of the time such services were rendered, such travel was performed, and such rented facilities were used, respectively.

§ 63.22 Cost sharing.

Policy Research funds shall not be used to pay any recipient of a grant for the conduct of a research project an amount equal to as much as the entire cost of the project.

§ 63.23 Telecommunications Demonstration Grants.

The provisions of this section apply only to grants awarded under authority of 392A of the Communications Act of 1934.

(a) Funds provided under the Telecommunications Demonstrations Program shall be available to support the planning, development, and acquisition or leasing of facilities and equipment necessary to the demonstration. However, funds shall not be available for the construction, remodeling, or repair of structures to house facilities or equipment acquired or developed with such funds, except that such funds may be used for minor remodeling which is necessary for and incident to the installation of such facilities or equipment.

(b) Funds shall not be available for the development of programming materials or content.

(c) The funding of any demonstration under this authority shall continue for not more than three years from the date of the original grant or contract.

(1) Applications for assistance under the Act may project goals and activities over a period of up to three years. Approval of a multi-year project is intended to offer the project a reasonable degree of stability over time and to facilitiate additional long range planning.

(2) Applications proposing a multiyear project must be accompanied by an explanation of the need for multiyear support, an overview of the objectives and activities proposed, and budget estimates to attain these objectives in any proposed subsequent year.

(3) Subject to the availability of funds, an application for assistance to continue a project during the project period will be reviewed on a non-competitive basis to determine—

(i) If the award recipient has complied with the award terms and conditions, the Act, and applicable regulations;

(ii) The effectiveness of the project to date in terms of progress toward its goals, or the constructive changes proposed as a result of the ongoing evaluation of the project; and,

(iii) If continuation of the project would be in the best interests of the Government.

(d) The use of equipment in demonstration projects shall be subject to the rules and regulations of the Federal Communications Commission (FCC), and grant funds may not be expended or obligated for purchase, lease, or use of such equipment prior to appropriate and necessary coordination by the grantee with the Commission. In particular:

(1) For any project requiring a new or modification of an existing authorization(s) from the FCC, application(s) to the FCC for such authorization(s) must have been tendered for filing prior to the closing date established by any solicitation for grant applications offered under the Telecommunications Demonstration Program.

(2) If the project is to be associated with an existing telecommunications activity requiring an FCC authorization, such operating authority for that activity must be current and valid.

(3) For any project requiring a new or modification of an existing authorization(s) from the FCC, the applicant must file with the Secretary of Health and Human Services a copy of each FCC application and any amendments thereto.

(4) For any project requiring a new or modification of an existing authorization(s) from the FCC, the applicant must tender for filing with the FCC a copy of the application to the Secretary for a telecommunications demonstration grant.

(5) If the applicant fails to file required applications by the closing date established by the solicitation for grant applications, or if the FCC returns as substantially incomplete or deficient, dismisses, or denies an application required for the project, or any part thereof, or for the operation of any facility with which the project is associated, the Secretary may return the application for Federal assistance.

(e) For the purposes of this program, the term "non-broadcast telecommunications facilities" includes but is not limited to, cable television systems, communications satellite systems and related terminal equipment, and other methods of transmitting, emitting, or receiving images and sounds or intelligence by means of wire, radio, optical, electromagnetic, and other means (including non-broadcast utilization of telecommunications equipment normally associated with broadcasting use).

(f) Each applicant shall provide such information as the Assistant Secretary deems necessary to make a Federal assessment of the impact of the project on the quality of the human environment in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (including the National Historical Preservation Act and other environmental acts). (42 U.S.C. 4332(2)(C)).

[42 FR 36149, July 13, 1977]

Subpart C—Special Provisions

§ 63.30 Scope of subpart.

This subpart sets forth supplemental special provisions which apply to all grants awarded by the Assistant Secretary.

§ 63.31 Protection of human subjects.

All grants made pursuant to this part are subject to the specific provisions of Part 46 of this subtitle relating to the protection of human subjects.

§ 63.32 Data collection instruments.

(a) *Definitions.* For the purposes of this section "Child" means an individual who has not attained the legal age of consent to participate in research as determined under the applicable law of the jurisdiction in which such research is to be conducted.

"Data-collection instruments" means tests, questionnaires, inventories, interview schedules or guides, rating scales, and survey plans or any other forms which are used to collect information on substantially identical items from 10 or more respondents.

"Respondents" means individuals or organizations from whom information is collected.

(b) *Applicability.* This section does not apply to instruments which deal solely with (1) functions of technical proficiency, such as scholastic aptitude or school achievement, or (2) routine demographic information.

(c) *Protection of privacy.* (1) No project supported under this part may involve the use of data collection instruments which constitute invasion of personal privacy through inquiries regarding such matters as religion, sex, race, or politics.

(2) A grantee which proposes to use a data collection instrument shall set forth in the grant application an explanation of the safeguards which will be used to restrict the use and disclosure of information so obtained to purposes directly connected with the project, including provisions for the destruction of such instruments where no longer needed for the purposes of the project.

(d) *Clearance of instruments.* (1) Grantees will not be required to submit data-collection instruments to the Assistant Secretary or obtain the Assistant Secretary's approval for the use of these instruments, except where the notification of grant award specifically so provides.

(2) If a grantee is required under paragraph (d)(1) of this section to submit data-collection instruments for the approval of the Assistant Secretary or if a grantee wishes the Assistant Secretary to review a data-collection instrument, the grantee shall submit seven copies of the document to the Assistant Secretary along with seven copies of the Office of Management and Budget's standard form No. 83 and seven copies of the Supporting Statement as required in the "Instructions for Requesting OMB Approval under the Federal Reports Act" (Standard form No. 83A).

(e) *Responsibility for collection of information.* A grantee shall not in any way represent or imply (either in a letter of transmittal, in the data-gathering instruments themselves, or in any other manner) that the information is being collected by or for the Federal Government or any department, agency or instrumentality thereof. Basic responsibility for the study and the data-gathering instruments rests with the grantee.

(f) *Parental consent.* In the case of any survey using data-collection instruments in which children are involved as respondents, the grantee, in addition to observing the other requirements contained in this section, and in Part 46 of this subtitle as appropriate, shall provide assurances satisfactory to the Assistant Secretary that informed consent will be obtained from the parents of each such respondent prior to the use of such instruments, except that a waiver from the requirements of this paragraph for specific data-collection activities may be granted upon the written request by the grantee and a determination by the Assistant Secretary that a waiver is necessary in order to fully carry out the purposes of the grant.

§ 63.33 Treatment of animals.

If animals are utilized in any project receiving assistance, the applicant for such assistance shall provide assurances satisfactory to the Assistant Secretary that such animals will be provided with proper care and humane treatment; in accordance with the Animal Welfare Act (7 U.S.C. 2131 et seq.) and regulations set forth in (9 CFR 1, 2, 3, 4).

§ 63.34 Principal investigators.

The principal investigator(s) designated in successful grant applications as responsible for the conduct of the approved project, shall not be replaced without the prior approval of the Assistant Secretary or his designee. Failure to seek and acquire such approval may result in the grant award being terminated in accordance with the procedures set forth in § 74.114 of this subtitle or such other regulations as may be indicated in the grant terms and conditions.

§ 63.35 Dual compensation.

If a project staff member or consultant of one grantee is involved simultaneously in two or more projects supported by any funds either under this part or otherwise, he/she may not be compensated for more than 100 percent of his/her time from any funds during any part of the period of dual involvement.

§ 63.36 Fees to Federal employees.

The grantee shall not use funds from any sources to pay a fee to, or travel expenses of, employees of the Federal Government for lectures, attending program functions, or any other activities in connection with the grant.

§ 63.37 Leasing facilities.

In the case of a project involving the leasing of a facility, the grantee shall demonstrate that it will have the right to occupy, to operate, and, if necessary, to maintain and improve the leased facility during the proposed period of the project.

§ 63.38 Publications.

Any publication or presentation resulting from or primarily related to Federal financial assistance under this part shall contain an acknowledgement essentially as follows:

> The activity which is the subject of this report was supported in whole or part by a grant from the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services. However, the opinions expressed herein do not necessarily reflect the position or policy of that Office and no official endorsement by that Office should be inferred.

§ 63.39 Religious worship or instruction.

Federal funds shall not be used for the making of any payment for religious worship or instruction, or for the construction, operation, or maintenance of so much of any facility as is used or to be used for sectarian instruction or as a place for religious instruction.

PART 67—STUDENT LOAN MARKETING ASSOCIATION—ISSUANCE AND TRANSFER OF COMMON STOCK

Sec.
67.1 Purpose and scope.
67.2 Definitions.
67.3 Initial issuance of common stock.
67.4 Subsequent transfer of common stock.
67.5 Registration of common stock.

AUTHORITY: Sec. 439(f), Higher Education Act of 1965 as added by sec. 133, Pub. L. 92-318, 86 Stat. 265, (20 U.S.C. 1087-2).

SOURCE: 38 FR 28291, Oct. 12, 1973, unless otherwise noted.

§ 67.1 Purpose and scope.

The purpose of the regulations published under this part is to prescribe the class of institutions and organizations that may acquire the common stock of the Association. The regulations deal with both the initial issuance of such stock and its subsequent transfer but are not to be deemed as exhaustive of the Secretary's authority to issue regulations pursuant to section 439 of the Higher Education Act of 1965. The sections that follow are intended to facilitate the broadest possible distribution of the common stock of the Association among lenders and educational institutions participating in or eligible to participate in programs of guaranteed student loans authorized by part B of title IV of the Higher Education Act of 1965.

§ 67.2 Definitions.

As used in this part—

"Act" means title IV, part B of the Higher Education Act of 1965, as amended (20 U.S.C. 1071-1087-2).

"Commissioner of Education" means the U.S. Commissioner of Education.

"Eligible holder" means (a) an eligible lender and (b) an eligible institution as defined in this part.

"Eligible institution" means an institution of higher education or vocational school which meets the applicable requirements of sections 435(b)-(f) of the Act.

"Eligible lender" means a financial or credit institution or other organization which (a) is party to a contract of insurance pursuant to the Act with the Commissioner of Education, (b) is otherwise found by the Commissioner of Education to be an "eligible lender" under the Act, or (c) is a party to a contract of insurance with a State or a nonprofit private agency under a student loan insurance program covered by an agreement with the Commissioner of Education under section 428(b) of the Act.

"Secretary" means the Secretary of Health and Human Services.

"Student Loan Marketing Association" or "Association" means the Government sponsored private corporation established by section 439 of the Act (20 U.S.C. 1087-2) for the purpose of serving as a secondary market and warehousing facility for loans to vocational students and students in institutions of higher education which have been insured pursuant to Part 177 of Chapter I, Office of Education, of this title.

§ 67.3 Initial issuance of common stock.

In order to effect any initial issuance of shares of common stock to eligible holders, the Association may enter into a contract or contracts with security underwriters, including banks ("underwriters"), under which the underwriters will purchase and take title to such shares for the purpose of distributing them directly or through selected security dealers, including banks, to eligible holders.

§ 67.4 Subsequent transfer of common stock.

Any shares of common stock that have been acquired by an eligible holder may thereafter be sold and transferred only to other eligible holders or to security brokers and dealers who will acquire the shares of common stock for the purpose of making a secondary market in such shares or facilitating the sale and purchase of such shares by eligible holders.

§ 67.5 Registration of common stock.

Any institution or organization entitled to own shares of common stock under the provisions of this part may cause such shares of common stock as it owns to be registered on the books of the Association in its own name or, provided that the request for such registration is accompanied by evidence satisfactory to the Association that the owner is an eligible lender or an eligible institution, in the name of a nominee or in the name of a security broker or dealer, including a bank.

PART 71—HHS DAY CARE REQUIREMENTS

Subpart A—General

Sec.

71.2 Basis and purpose.
71.4 Definitions.
71.6 Compliance with nondiscrimination requirements.
71.8 Availability of Federal financial participation.

Subpart B—Day Care Center

71.10 Program of activities for children.
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71.16 Health and safety.
71.18 Physical environment.
71.20 Social services.
71.22 Parent involvement.
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Subpart C—Day Care Home

71.30 Program of activities for children.

Sec.
71.32 Training.
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Subpart D—State Agency Administration

71.56 Monitoring.
71.58 Rates of payment.
71.60 Future review of day care regulations.
71.62 State Agency Advisory Council.
71.64 State Agency waiver.
71.66 Effective date.

AUTHORITY: Title XX of the Social Security Act, Sec. 2002(a)(9)(B), 42 U.S.C. 1397a(a)(9)(B); and Title V of the Headstart, Economic Opportunity, and Community Partnership Act of 1974 (Headstart-Follow Through Act), Sec. 582(d) 42 U.S.C. 2932(d).

SOURCE: 45 FR 17881, Mar. 19, 1980, unless otherwise noted.

EFFECTIVE DATE NOTE: The effective dates of §§71.12, 71.24, 71.32, 71.36, 71.40 and 71.44 are codified in §71.66.

Subpart A—General

§ 71.2 Basis and purpose.

(a) This part sets forth the requirements that State agencies and day care facilities must meet as the conditions for the receipt by State agencies of Federal Financial Participation (FFP) in the costs of child day care services under the following HHS assisted programs:

(1) Social Security Act.

(i) Title IV-A (Social Services to Guam, Puerto Rico, the Virgin Islands, and the Northern Marianas; and the Work Incentive Program (WIN)).

(ii) Title IV-B (Child Welfare Services).

(iii) Title XX (Social Services);

(2) Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963;

(3) Developmental Disabilities Services and Facilities Construction Act of 1970;

(4) Developmentally Disabled Assistance and Bill of Rights Act of 1975 (Developmental Disabilities Special Projects).

(b) This part implements Title XX of the Social Security Act, Section 2002(a)(9)(B), 42 U.S.C. 1397a(a)(9)(B), and Title V of the Headstart, Economic Opportunity, and Community Partnership Act of 1974 (Headstart-Follow Through Act), Section 582(d), 42 U.S.C. 2932(d). These sections authorize the Secretary to prescribe requirements to govern the provision of day care services under HHS assisted programs.

§ 71.4 Definitions.

In these regulations, the term:

Attendance means the number of children present at the facility.

Caregiver means a person who provides direct care, supervision, and guidance to children in a day care facility.

Day care means the care, supervision, and guidance of a child, on a regular basis, for periods of less than 24 hours per day, in a place other than the child's own home.

Day care center means a place in which day care is provided to more than 12 children.

Day care home means a private residence in which day care is provided to 12 or fewer children.

Early and Periodic, Screening, diagnosis and Treatment (EPSDT) means a component of each State's medical assistance program mandated under title XIX of the Social Security Act (Medicaid) which provides preventive child health services to eligible low income children.

Group means a cluster of children assigned to one or more caregivers.

Group size means the total number of children assigned to one or more caregivers.

Scheduled Enrollment means the number of children expected to be in attendance for any day or for some period of time during the day.

State Agency means the agency that receives Federal funds for day care and that has ultimate responsibility for the conduct of the day care services program.

§ 71.6 Compliance with nondiscrimination requirements.

The following HHS regulations apply to services provided under this part:

45 CFR Part 80—Nondiscrimination Under Programs Receiving Federal Assistance through the Department of Health and Human Services's Implementation of Title VI of the Civil Rights Act of 1964.

45 CFR Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

§ 71.8 Availability of Federal financial participation (FFP).

(a) FFP is available in the costs of child day care services, only if the care meets the requirements of this part.

(b) The care is considered to meet the requirements of this part only if:

(1) It is provided by a facility which:

(i) Meets State standards for licensing, registration, certification, or approval; and

(ii) Has been approved by the State agency as meeting the requirements of this part, or has submitted to the State agency a plan of correction acceptable to the State agency for any requirement that the facility has been found not to meet. The State agency may accept a plan of correction only if the plan specifies a reasonable time period for meeting the requirements of this part. The facility must meet the requirements of this part within the time period specified in its plan of correction; and

(2) The State agency meets its requirements as provided in this part, or the State agency has submitted to the Secretary a plan of correction acceptable to the Secretary for any requirement that the State agency has been found not to meet. The Secretary accepts a plan of correction only if the plan specifies a reasonable time period for meeting the requirements of this part. The State agency must meet the requirements of this part within the time period specified in its plan of correction.

Subpart B—Day Care Center

§ 71.10 Program of activities for children.

(a) *Day Care Center.* A day care center shall establish a planned program of developmentally appropriate activities which promotes the intellectual, social, emotional, and physical development of the children it serves. The planned program shall be in writing and shall be made available to parents. The plan shall contain a description of activities children engage in and how those activities meet their developmental needs, including the special needs of children in the center who are multilingual or handicapped.

(b) *State Agency.* The State Agency shall provide information and technical assistance to day care centers on establishing a planned program of developmentally appropriate activities.

§ 71.12 Training.

(a) *Day Care Center.* (1) A day care center shall provide to newly hired caregivers a one week on-site orientation to the day care program during the first week of employment. The orientation must address at a minimum—

(i) Emergency health and safety procedures at the center;

(ii) Any special health or nutrition problems of the children assigned to the caregiver;

(iii) Any special developmental needs of the children assigned to the caregiver;

(iv) The planned program of activities at the center; and

(v) Meal patterns at the center.

(2) Each caregiver without a nationally recognized child development credential appropriate for the age of the children cared for by the caregiver shall regularly participate in specialized training related to child care. Caregivers shall begin to participate in specialized training within a reasonable period of time after April 1, 1981. Caregivers hired after April 1, 1981 must begin to participate in training within six months of employment.

(b) *State Agency.* (1) The State Agency shall establish and implement a statewide plan for providing or purchasing training for all center caregivers. The plan must specify the nature and extent of the training required for caregivers and address the following subjects:

- Child Growth and Development.
- Child Care Programming and Activities.
- Health and Safety Practices.
- Nutrition and Good Eating Habits.
- Design and Use of Physical Space.
- Working with Parents.
- Community Health and Social Service Resources.
- Day Care for Multilingual Children.
- Day Care for Handicapped Children.
- Handling Behavior Problems.

(2) The State Agency shall periodically assess its statewide training program for center caregivers and report to the Secretary on the effectiveness of this program by March 30, 1984.

§ 71.14 Nutrition.

(a) *Day Care Center.* A day care center shall provide adequate and nutritious meals prepared on a safe and sanitary manner. Breakfast shall be provided at parent request. Lunch and mid-morning and mid-afternoon snacks shall be provided. When children are in care during evening and night hours, the center shall provide an evening meal.

(b) *State Agency.* The State agency shall make the consultative services of a qualified nutritionist or food service specialist available to day care centers.

§ 71.16 Health and safety.

(a) *Day Care Center.* (1) A day care center shall have on record for each enrolled child whose parents do not object on religious grounds, a statement from a licensed health practitioner that—

(i) Describes any special precautions for diet, medication, or activity;

(ii) States that the child has received immunizations in accordance with recommendations of the U.S. Public Health Service or the American Academy of Pediatrics; and

(iii) States that the child has received a health assessment in accordance with the standards of the American Academy of Pediatrics, or the EPSDT National Recommended Health Assessment Plan.

(2) The statement for each child must be on record within 60 days of enrollment, and must be updated according to the recommended schedule for routine health supervision of the American Academy of Pediatrics, or the EPSDT National Recommended Health Assessment Plan.

(3) A day care center shall have plans to respond to illness and to emergencies including fire, serious injury, and ingestion of poison. The plans must be in writing.

(4) A day care center shall not dispense medications to a child without the written consent of his or her parent. All medications shall be dispensed in accordance with instructions from a parent or physican. Medications shall be kept in labelled containers out of the reach of children.

(5) A day care center shall provide information to parents as needed concerning child health services available in the community, and shall assist parents in obtaining the health services.

(b) *State Agency.* (1) The State agency shall provide information to each day care center about the availability of child health services in the community and about how the services may be obtained.

(2) The State agency shall establish and maintain health standards for day care center personnel.

(3) The State agency shall make arrangements so that HHS funded children in day care centers who are eligible for Federal, State, or locally funded health services receive those services when needed.

§ 71.18 Physical environment.

(a) *Day Care Center.* A day care center shall meet:

(1) State and local requirements for licensing or approval;

(2) State and local codes relating to health, sanitation, and building and fire safety; and

(3) State day care center standards for transportation, swimming, and equipment safety.

(b) *State Agency.* The State agency shall ensure that standards for day care centers that specifically address sanitation, and transportation, swimming, and equipment safety exist in the State.

§ 71.20 Social services.

(a) *Day Care Center.* A day care center shall provide information to parents, as needed, concerning social services available in the community and shall assist parents in obtaining the social services.

(b) *State Agency.* (1) The State agency shall provide information to each day care center about the availability of social services in the community and about how the services may be obtained.

(2) The State agency shall make arrangements so that HHS funded children in day care centers who are eligible for Federal, State or locally funded social services receive those services when needed.

§ 71.22 Parent Involvement.

(a) *Day Care Center.* A day care center shall—

(1) Provide parents with opportunities to observe the center and to discuss their children's needs before enrollment;

(2) Offer parents unlimited access to the day care center to observe their children;

(3) Regularly offer parents opportunities to meet with caregivers to discuss their children's needs;

(4) Regularly exchange information with parents about their children and the day care program;

(5) Offer parents, individually and as a group, meaningful opportunities to participate in general program policymaking; and

(6) Provide parents upon request any monitoring reports or evaluations of the center prepared by and received from Federal, State, or local authorities.

(b) *State Agency.* (1) The State agency shall provide information and technical assistance to day care centers on working with parents.

(2) The State agency shall offer parents their choice of day care facility whenever administratively feasible. The State agency shall make a copy of the HHS day care requirements available to parents of children in HHS-funded day care.

§ 71.24 Group composition.

(a) *Day Care Center.*—(1) *Group Size.* (i) A day care center shall meet the following group size requirements at all times of the day, except during arrival and departure times, meals, naptime and special activities such as field trips and playground activities:

Age of child	Maximum group size scheduled enrollment	Maximum group size attendance
Birth to 2 years	6	6
2 years	12	12
3 to 6 years	18	16
6 to 10 years	16	14
10 to 14 years	20	18

(ii) For mixed age groups, a day care center shall meet the group size requirements for the age of the youngest child in the group, if children in the youngest age category make up 20% or more of the group. If children in the youngest age category make up less than 20% of the group, the group size requirement for the next highest age category must be met.

(iii) If more than one group occupies a single room, each group must have its own clearly defined physical space.

(2) *Staffing Requirements.* (i) A day care center shall meet the following staffing requirements:

Age of child	Staffing requirement scheduled enrollment	Staffing requirement attendance
Birth to 2 years	1:3	1:3
2 years	1:4	1:4
3 to 6 years	1:9	1:8
6 to 10 years	1:16	1:14
10 to 14 years	1:20	1:18

(ii) A day care center shall calculate the required staff hours by dividing the total child hours for each age category served by the age appropriate staffing requirement.

(iii) A day care center shall ensure that required staff are present with children at all times, except for normal breaktimes.

(iv) Staffing requirements may be met for children aged two years and older on a centerwide basis. (For example, if a center determines that it needs 4 caregivers to meet the staffing requirement for its 2 year old children, and 10 caregivers for its 5 years old children, the center would meet the staffing requirement so long as it had 14 caregivers assigned to care for children in both categories. The center need not necessarily assign 4 caregivers to care for its 2 year old children, nor assign 10 caregivers to care for its 5 year old children.)

(v) A day care center shall meet the staffing ratio requirement for each group of children under two years of age at all times, except naptime.

(vi) For mixed age groups which include children under two years old, a day care center shall meet the staffing requirements for the age of the youngest child in the group, if children in the youngest age category make up 20% or more the group. If children in the youngest age category make up less than 20% of the group, the staffing requirement for the next highest age category must be met.

(vii) At least one caregiver shall be present with children at all times.

(viii) Hours spent providing direct care to children by a volunteer may be counted towards meeting the staffing requirements, if the volunteer works at least 10 hours a week and complies with the training requirement at § 71.12.

(ix) Hours spent providing direct care to children by a staff member who otherwise performs non-caregiving duties may be counted towards meeting the staffing requirements, if the staff member complies with the requirement at § 71.12.

(x) A day care center shall obtain substitutes in the case of caregiver absences.

(b) *State Agency.* (1) The State agency shall determine compliance with the group size requirements on a group by group basis.

(2) The State agency shall determine compliance with the group size and staffing requirements on the basis of either actual attendance or scheduled enrollment.

(3) The State agency shall reimburse day care centers in accordance with the its method of determining compliance with the staffing and grouping requirements.

Subpart C—Day Care Home

§ 71.30 Program of activities for children.

(a) *Day Care Home.* A day care home shall establish a planned program of developmentally appropriate activities which promotes the social, intellectual, emotional, and physical development of the children it serves, including any multilingual or handicapped children in the home.

(b) *State Agency.* The State Agency shall provide information and technical assistance to day care homes on establishing a planned program of developmentally appropriate activities.

§ 71.32 Training.

(a) *Day Care Home.* Each caregiver without a nationally recognized child development credential appropriate for the age of the children served in the home shall regularly participate in specialized training related to child care. Caregivers shall begin to participate in specialized training within a reasonable period of time after April 1, 1981. Caregivers assuming caregiving duties after April 1, 1981 must begin to participate in training within six months of assuming caregiving duties.

(b) *State Agency.* (1) The State Agency shall establish and implement a statewide plan for providing or purchasing training for all day care home caregivers. The plan must specify the nature and extent of the training required for day care home caregivers and address the following areas:

- Child Growth and Development.
- Child Care Programming and Activities.
- Health and Safety Practices.
- Nutrition Practices and Good Eating Habits.
- Design and Use of Physical Space.
- Working with Parents.
- Community Health and Social Service Resources.
- Day Care for Multilingual Children.
- Day Care for Handicapped Children.
- Day Care Home Administration.
- Handling Behavior Problems.

(2) The State Agency shall periodically assess its statewide training program for home caregivers and report to the Secretary on the effectiveness of the program by March 30, 1984.

§ 71.34 Nutrition.

(a) *Day Care Home.* A day care home shall provide adequate and nutritious meals prepared in a safe and sanitary manner. Breakfast shall be provided at parent request. Lunch and mid-morning and mid-afternoon snacks shall be provided. When children are in care during evening and night hours, the home shall provide an evening meal.

(b) *State Agency.* The State Agency shall make the consultative services of a qualified nutritionist or food service specialist available to day care homes.

§ 71.36 Health and safety.

(a) *Day Care Home.* (1) A day care home shall have on record for each child enrolled in a day care home whose parents do not object on religious grounds, a statement from a licensed health practitioner that—

(i) Describes any special precautions for diet, medication, or activity;

(ii) States that the child has received immunizations in accordance with recommendations of the U.S. Public Health Service or the American Academy of Pediatrics; and

(iii) States that the child has received a health assessment in accordance with the standards of the American Academy of Pediatrics, or the EPSDT National Recommended Health Assessment Plan.

(2) The statement for each child must be on record within 60 days of enrollment, and must be updated according to the recommended schedule for routine health supervision of the American Academy of Pediatrics, or the EPSDT National Recommended Health Assessment Plan.

(3) A day care home shall have plans to respond to illness and emergencies including fire, serious injury, and ingestion of poison.

(4) A day care home shall not dispense medications to a child without the written consent of his or her parent. All medications shall be dispensed in accordance with instructions from a parent or physician. Medications shall be kept in labelled containers out of the reach of children.

(5) A day care home shall provide information to parents, as needed, concerning child health services available in the community, and shall refer parents to appropriate health services agencies.

(b) *State Agency.* (1) The State agency shall provide information to each day care home about the availability of child health services in the community and about how the services may be obtained.

(2) The State agency shall establish and maintain health standards for day care home personnel.

(3) The State agency shall make arrangements so that HHS funded children in day care homes who are eligible for Federal, State, or locally funded health services receive those services when needed.

§ 71.38 Physical environment.

(a) *Day Care Home.* A day care home shall meet—

(1) State and local requirements for licensing, certification, registration, or approval;

(2) State and local codes relating to health, sanitation, and building and fire safety applicable to residential occupancy; and

(3) State day care home standards for transportation, swimming, and equipment safety.

(b) *State Agency.* The State agency shall ensure that standards for day care homes that specifically address sanitation and transportation, swimming, and equipment safety exist in the State.

§ 71.40 Social services.

(a) *Day Care Home.* A day care home shall provide information to parents, as needed, concerning social services available in the community, and shall refer parents to appropriate social services agencies.

(b) *State Agency.* (1) The State agency shall provide information to each day care home about the availability of social services in the community and about how the services may be obtained.

(2) The State agency shall make arrangements so that HHS funded children in day care homes who are eligible for Federal, State or locally funded social services receive those services when needed.

§ 71.42 Parent involvement.

(a) *Day Care Home.* A day care home must—

(1) Provide parents with opportunities to observe the home and to discuss their children's needs before enrollment;

(2) Inform parents about the day care program and its policies;

(3) Regularly offer parents opportunities to observe their children, and talk about their children's needs; and

(4) Regularly exchange information with parents about their children.

(b) *State Agency.* (1) The State agency shall provide information and technical assistance to day care homes on working with parents.

(2) The State agency shall offer parents their choice of day care facility whenever administratively feasible. The State agency shall make a copy of the HHS day care requirements available to parents using HHS-funded day care.

§ 71.44 Group composition.

(a) In a day care home in which one caregiver cares for children of all ages, including children under two years of age, the group size at any given time shall not exceed five. No more than two of these children may be under two years of age. The caregiver's own children younger than six and not yet in full day school shall count towards the group size requirement.

(b) In a day care home in which one caregiver cares for children who are all under two years of age, the group size at any given time shall not exceed three. There may be no other children in the home besides the caregiver's own children over the age of six years.

(c) In a day care home in which one caregiver cares for children who are all two years of age or older, the group size at any given time shall not exceed six, except that two additional school age children may be cared for before and after school hours. The caregiver's own children younger than six and not yet in full day school shall count towards the group size requirement.

(d) In a day care home in which two or more caregivers care for children of all ages, including children under two years of age, the group size at any given time shall not exceed ten. No more than two of these children may be under two years of age. The caregivers' own children younger than six and not yet in full day school shall count towards the group size requirement.

(e) In a day care home in which two or more caregivers care for children who are all two years of age or older, the group size at any given time shall not exceed 12, except that two additional school age children may be cared for before and after school hours. The caregivers' own children younger than six and not yet in full day school shall count towards the group size requirements.

Subpart D—State Agency Administration

§ 71.56 Monitoring.

(a) The State agency must determine each day care facility's compliance with these requirements at least annually.

(b) The State agency shall make an on-site visit to a day care facility at least every three years and whenever the State has reason to believe that the facility fails to meet the requirements of this part.

§ 71.58 Rates of payment.

(a) In establishing rates of payment for child day care services the State agency shall take into account the costs to the facility of meeting this part.

(b) The State agency shall make available upon request the basis for its day care reimbursement rates, and the procedures used to determine those rates.

§ 71.60 Future review of day care regulations.

The Secretary will review the effectiveness of these regulations 36 months after the April 1, 1981 effective date. As part of this review, the

Secretary will publish a notice of opportunity for public comment on the effectiveness of the regulations. The Secretary will assess the comments and publish the results of the review and assessment in the FEDERAL REGISTER.

§ 71.62 State agency advisory council.

(a) The State agency shall have a Day Care Advisory Council to advise the State agency on the implementation of HHS day care requirements.

(b) Membership on the Day Care Advisory Council must include parents of HHS funded children in day care, operators of day care centers and day care homes, and representatives of appropriate public agencies.

§ 71.64 State agency waiver.

The State agency may waive the group composition requirements in § 71.24 for a day care center in which not more than 20% or 10 (whichever is lower) of the children in the center are children whose care is paid for wholly or in part with Federal funds, if the day care center meets State licensing standards.

[45 FR 17881, Mar. 19, 1980; 45 FR 46808, July 11, 1980]

§ 71.66 Effective date.

These regulations are effective on January 2, 1982 except that—

(a) The training requirements in § 71.12 and § 71.32 and the requirements in § 71.36 and § 71.40 that day care homes inform parents about and refer them to health and social services, will become effective on July 1, 1982; and

(b) For any State, the January 2, 1982 effective date of the group composition requirements at § 71.24 and § 71.44 may be extended for not more than two years upon a showing satisfactory to the Secretary that substantial numbers of HHS funded children are receiving care in centers that meet group composition requirements less stringent than the requirements in § 71.24 and § 71.44 and that additional time is needed to meet those requirements within the State. The showing must—

(1) Be made to the Secretary by the State agency by January 2, 1982; and

(2) Include detailed information about the group composition requirements currently being met by the centers within the State;

(3) Indicate the number of HHS funded children who are receiving care in centers that do not comply with the group composition requirements in § 71.24 and § 71.44;

(4) Estimate the time necessary to fully meet those requirements in centers caring for HHS funded children within the State; and

(5) Include a schedule for a gradual phase-in of the requirements.

[45 FR 17881, Mar. 19, 1980; 45 FR 54765, Aug. 18, 1980, as amended at 46 FR 37051, July 17, 1981]

PART 73—STANDARDS OF CONDUCT

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AUTHORITY: 5 U.S.C. 7301; E.O. 11222, May 8, 1965; 5 CFR 735.104.

SOURCE: 46 FR 7369, Jan. 23, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 73.735-101 Purpose.

To assure that the business of the Department of Health and Human Services (HHS) is conducted effectively, objectively, and without improper influence or the appearance of improper influence, employees and special Government employees must be persons of integrity and must observe high standards of honesty, impartiality, and behavior. They must not engage in any conduct prejudicial to the Government and must avoid conflicts of private interests with public duties and responsibilities. In accord with these principles, the regulations in this Part are issued to inform HHS employees and special Government employees what standards of conduct are expected of them in performing their duties and what activities are permitted or prohibited both while they are employed and after their employment with the Department is ended.

§ 73.735-102 Definitions.

In this part:

(a) "Employee" means an officer or employee of HHS other than a special Government employee and includes Commissioned Officers of the Public Health Service who are on active duty, and individuals on assignment or detail to HHS pursuant to the Intergovernmental Personnel Act (5 U.S.C. 3371–3376). The term also includes HHS employees who are detailed to non-Federal or other Federal organizations. At times the term "regular employee" is used in place of "employee" to make a clear distinction between special Government employees and others employed by the Federal government.

(b) "Special Government employee" means an individual who is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days.

(c) "Person" means an individual, a corporation, a company, an association, a firm, a partnership or any other organization.

(d) "Former employee" means a former employee of HHS or former special Government employee as defined in paragraph (b) of this section.

(e) "Principal Operating Component" has the meaning given to that term in the Department's General Administration Manual. In addition, when used in these regulations, it includes the Office of the Secretary.

(f) "Department" means the Department of Health and Human Services.

§ 73.735–103 Applicability.

(a) The regulations in this Part apply to all employees of the Department and to special Government employees to the extent indicated in Subparts J and K. They apply whether an employee is on leave, including leave without pay, or on duty.

(b) These regulations may be supplemented by regulations governing principal operating components, or subunits of principal operating components, provided the clearance and publication requirements for standards of conduct regulations are met and approval is obtained from the Department Ethics Counselor and the Assistant Secretary for Personnel Administration.

Subpart B—Responsibilities

§ 73.735–201 Employees and supervisors.

(a) Employees and special Government employees shall be responsible for observing all generally accepted rules of conduct and the specific provisions of law and the regulations of this Part that apply to them. They are required to become familiar with these regulations and to exercise informed judgments to avoid misconduct or conflicts of interest. They shall secure approvals when required and file financial disclosure reports or statements in accordance with the provisions of this Part. Failure to observe any of these regulations may be cause for disciplinary action. Some of the provisions are required by law and carry criminal penalties which are in addition to any disciplinary action which could be taken. When employees have doubts about any provision, they should consult their supervisor, personnel office, or the Department Ethics Counselor or a deputy counselor.

(b) Supervisors, because of their day-to-day relationships with employees, are responsible to a large degree for making sure high standards of conduct are maintained. They must become familiar with the Department's standards of conduct regulations and apply the standards to the work they do and supervise. Supervisors shall take suitable action, including disciplinary action in accordance with Subpart L of these regulations, when violations occur.

§ 73.735–202 Management officials.

(a) The Department has an obligation to enforce the requirements of this Part in all respects and to help employees, special Government employees, and supervisors carry out their responsibilities to maintain high standards of ethical conduct. This includes an obligation for managers to provide information and training concerning the HHS conduct regulations, to provide advice and guidance with respect to them, and to review for possible conflicts of interest certain outside activities and financial interests of employees. The officials responsible for discharging the Department's oligations in this regard are identified in paragraphs (b) through (f) of this section.

(b) Department Ethics Counselor. The Assistant General Counsel, Business and Administrative Law Division, shall be the Department Ethics Counselor and shall serve as the Designated Agency Official for matters arising under the Ethics in Government Act of 1978, (Pub. L. 95-521). The responsibilities of the Department Ethics Counselor shall include:

(1) Rendering authoritative advice and guidance on matters of general applicability under the standards of this Part and all other laws and regulations governing employee conduct, with particular reference to conflicts of interest matters.

(2) Coordinating the Department's counselling and training services regarding conflicts of interest and assuring that employees of the Department are kept informed of developments in conflict of interest laws and other related matters of ethics.

(3) Receiving information on conflicts of interest and appearances of conflicts of interest involving employees of the Department and forwarding this information to the appropriate management official, or the Inspector General, as necessary, with his or her legal evaluation of the matters addressed.

(4) Reviewing the financial disclosure reports, requests for approval of outside activities, and similar reports filed by Executive level officers, noncareer executives, deputy ethics counselors, and Schedule C employees in the Office of the Secretary for the purpose of identifying and resolving possible and actual conflicts of interest.

(5) Maintaining liaison with the Office of Government Ethics.

(6) Advising management officials on the resolution of conflicts of interest by any of the remedies set forth in § 73.735-904 of this Part.

(7) Maintaining accurate and complete documentation of all formal guidance and advice regarding conflict of interest matters subject to the provisions of this Part, except for routine or repetitious cases where the guidance given is not precedential.

(8) Maintaining and publishing from time to time a list of those circumstances or situations which have resulted or may result in noncompliance with conflict of interest laws or regulations. [Section 206(b)(7), Pub. L. 95-521].

(9) Designating and training an appropriate number of reviewing officials to assist him or her in carrying out the duties of the Designated Agency Offical under the Ethics in Government Act.

(10) Maintaining effective lines of communication with deputy ethics counselors on all matters regarding employee conduct and ethics.

(c) Deputy Ethics Counselors. Assistant General Counsels and Regional Attorneys are designated deputy ethics counselors to assist the Department's Counselor in carrying out his or her responsibilities, particularly with respect to employees in the organization in which the deputy counselor serves. Regional Attorneys shall provide such assistance for all employees of the Department in organizations for which the Principal Regional Official provides personnel services.

(d) The Assistant Secretary for Personnel Administration shall be responsible for developing and issuing procedures and requirements for the implementation of these regulations and for monitoring the application of such procedures and requirements throughout the Department.

(e) Heads of Principal Operating Components and the Assistant Secretary for Management and Budget for the Office of the Secretary shall be ultimately responsible for assuring that persons who work for their respective organizations comply with the standards of this Part. Their responsibilities shall include:

(1) Designating officials to review and approve outside activity requests in accordance with § 73.735-708 of this Part or statements of employment or financial interests under § 73.735-902. A list of the officials designated for these purposes shall be provided to the Department Ethics Counselor and to the Assistant Secretary for Person-

nel Administration and shall be updated in January and July of each year.

(2) Designating for the components of his or her organization, other than those for which a principal regional official provides personnel services, one or more individuals to oversee and coordinate the administrative aspects of these regulations. Responsibilities of such a person include making sure each employee or special government employee is provided a copy of these regulations, or an appropriate summary thereof; ensuring that training in the requirements of the regulations is provided to supervisors and to new employees; providing for the distribution, receipt, review and retention of financial interest reports and statements as directed by the Department Ethics Counselor and the Assistant Secretary for Personnel Administration; sending annual reminders as required; providing for a file of outside work requests; giving information and assistance to employees on a day-to-day basis; and making available to employees the names and addresses of the Department's Ethics Counselor and deputy ethics counselors.

(f) Principal Regional Officials (PROs) shall designate one or more regional employees to perform, for components for which personnel services are provided by the PROs, the responsibilities in (e)(2) of this section.

Subpart C—Conduct on the Job

§ 73.735-301 Courtesy and consideration for others.

(a) An employee's conduct on the job is, in all respects, of concern to the Federal government. Courtesy, consideration, and promptness in dealing with the public must be shown in carrying out official responsibilities, and actions which deny the dignity of individuals or conduct which is disrespectful to others must be avoided. Employees must recognize that inattention to matters of common courtesy can adversely affect the quality of service the Department is responsible for providing. Where appropriate, courtesy to the public should be included in the standards for employee performance.

(b) Of equal importance is the requirement that courtesy be shown in day-by-day interaction with co-workers. Employees shall be polite to and considerate of other employees, and shall respect their needs and concerns in the work environment.

§ 73.735-302 Support of department programs.

(a) When a Department program is based on law, Executive Order or regulation, every employee has a positive obligation to make it function as efficiently and economically as possible and to support it as long as it is a part of recognized public policy. An employee may, therefore, properly make an address explaining and interpreting such a program, citing its achievements, defending it against uninformed or unjust criticism, or soliciting views for improving it.

(b) An employee shall not, either directly or indirectly, use appropriated funds to influence, or attempt to influence, a Member of Congress to favor or oppose legislation. However, when authorized by his or her supervisor, an employee is not prohibited from:

(1) Testifying, on request, as a representative of the Department on pending legislation or proposals before Congressional Committees; or

(2) Assisting Congressional Committees in drafting bills or reports on request, when it is clear that the employee is serving solely as a technical expert under the direction of committee leadership.

(c) All employees shall be familiar with regulations and published instructions that relate to their official duties and responsibilities and shall comply with those directives. This includes carrying out proper orders from officials authorized to give them.

(d) Employees are required to assist the Inspector General and other investigative officials in the performance of their duties or functions. This requirement includes the giving of statements or evidence to investigators of the Inspector General's office or other HHS investigators authorized to conduct investigations into potential violations.

§ 73.735-303 Use of government funds.

(a) An employee shall not:

(1) Improperly use official travel;

(2) Improperly use payroll and other vouchers and documents on which Government payments are based;

(3) Take or fail to account for funds with which the employee is entrusted in his or her official position; or

(4) Take other Government funds for personal use. Violation of these prohibitions carry criminal penalties.

(b) In addition, employees shall avoid wasteful actions or behavior in the performance of their assigned duties.

§ 73.735-304 Use of Government property.

(a) An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An Employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him or her. For example:

(1) Only official documents and materials may be processed on Government reproduction facilities. Both supervisors and employees must assure that this rule is strictly followed. (Exception for employee welfare and recreation associations is stated in Chapter 25-10, General Administration Manual. Exception for labor organizations is stated in Personnel Instruction 711-1.)

(2) Employees may drive or use Government automobiles or aircraft only on official business. Use of a Government owned, leased, or rented vehicle or aircraft for non-official purposes may result in suspension for at least 30 days or removal from the Federal service. 31 U.S.C. 638a.

Example: Normally, use of a Government automobile by travel between home and place of duty would not be considered official business and could not be authorized. An exception to this rule might be appropriate in a situation where an employee is required to leave early in the morning to attend a meeting in a distant city, or to return late in the day from such a meeting. Allowing the employee to drive a government car to his or her home the night before in order to leave from home, or to return to his or her home in the evening upon completion of the trip is permissible, provided the employee does not use the car for any personal reason.

§ 73.735-305 Conduct in Federal buildings.

(a) An employee shall not participate while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

(b) An employee shall not while in or on Government-owned or leased property or while on duty for the Government solicit alms and contributions, engage in commercial soliciting and vending, display or distribute commercial advertisements, or collect private debts.

(c) The prohibitions in (a) and (b) of this section do not preclude:

(1) Activities necessitated by an employee's law enforcement duties;

(2) Participation in Federally sponsored fund-raising activities conducted pursuant to Executive Order 10927, or similar HHS-approved activities; or

(3) Buying a lottery ticket at an authorized State lottery outlet for a lottery authorized by State law and conducted by an agency of a State within that State.

(d) General Services Administration regulations on "Conduct on Federal Property" apply to all property under the control of the General Services Administration, and they are also applicable to all buildings and space under the control of this Department. These regulations prohibit, among other things, gambling, being intoxicated, and possession, distribution, or use of narcotic or dangerous drugs on the premises. The GSA regulations are found in Subpart 101-20.3 of the GSA Regulations, 41 CFR 101-20.3.

§ 73.735-306 Sexual harassment.

Sexual harassment is deliberate unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome. Sexual harassment is unacceptable conduct and is expressly prohibited. In addition, supervisors and managers are prohibited from taking or promising personnel actions in exchange for sexual favors, or failing to take an action because an employee or applicant for employment, refuses to engage in sexual conduct. This same prohibition applies to relationships between Department personnel who take or recommend action on a grant or contract and the grantee or contractor. Those employees who wish to file a complaint of sexual harassment should contact the Office of Equal Employment Opportunity (EEO) within their respective agencies for guidance. (Time frames for pursuing a charge alleging sexual harassment are the same as for any other complaint based on allegations of sex discrimination.)

§ 73.735–307 Use of official information.

(a) The public interest requires that certain information in the possession of the Government be kept confidential, and released only with general or specific authority under Department or operating component regulations. Such information may involve the national security or be private, personal, or business information which has been furnished to the Government in confidence. In addition, information in the possession of the Government and not generally available may not be used for private gain. The following paragraphs set forth the rules to be followed by Department employees in handling information in official files or documents:

(1) *Classified information.* Employees who have access to information which is classified for security reasons in accordance with Executive Order 12065 are responsible for its custody and safekeeping, and for assuring that it is not disclosed to unauthorized persons. See the Department's Security Manual, Part 3 for details.

(2) *Security and investigative information.* Security and investigative data received from Government agencies or other sources for official use only within the Department or developed under a pledge of confidence is not to be divulged to unauthorized persons or agencies.

(3) *Information obtained in confidence.* Certain Department units (e.g., Food and Drug Administration, and the Social Security Administration) obtain in the course of their program activities certain information from businesses or individuals which they are forbidden by law from disclosing. These statutory prohibitions are found in 21 U.S.C. 331j, and 18 U.S.C. 1905. Each employee is responsible for observing these laws.

(4) *Use of information for private gain.* Government employees are sometimes able to obtain information about some action the Government is about to take or some other matter which is not generally known. Information of this kind shall not be used by the employee to further his or her or someone else's private financial or other interests. Such a use of official information is clearly a violation of a public trust. Employees shall not, directly or indirectly, make use of, or permit others to make use of, for the purpose of furthering any private interest, official information not made available to the general public.

(b) The Privacy Act provides criminal penalties for an employee who willfully discloses individually identifiable information from records, disclosure of which is prohibited by that Act. 5 U.S.C. 552a(i).

Subpart D—Financial Obligations

§ 73.735–401 General provisions.

(a) The Department considers the indebtedness of its employees to be a matter of their own concern. However, employees shall not by failure to meet their just financial obligations reflect adversely on the Government as their employer. Employees are expected to pay each just financial obligation in a proper and timely manner. A "just financial obligation" is one acknowledged by the employee or reduced to judgment by a court, or one imposed by law such as Federal, State, or local taxes. "In a proper and timely manner" is a manner which the Department determines does not, under the circumstances, reflect adversely on the part of an employee in meeting his or her financial obligations, particularly those that relate to support of the employee's family, to payment of Federal, State, or local taxes, or to payments to tax-supported institutions such as a city or state hospital, or educational institution. If for some reason an employee is unable to pay these obligations promptly, he or she is expected to make satisfactory arrangements for payment and abide by these arrangements.

(b) Disciplinary action may be considered when an employee has handled his or her financial affairs in such a way that:

(1) Action on complaints received from creditors requires the use of a considerable amount of official time, or

(2) It appears that financial difficulties are impairing the employee's efficiency on the job, or

(3) Because of the employee's financial irresponsibility, the attitude of the general public toward the Department may be adversely affected; and the employee after counseling does not make arrangements to meet his or her financial obligations.

Subpart E—Gifts, Entertainment, and Favors

§ 73.735-501 Prohibited acceptance of gifts, entertainment, and favors.

(a) Except as provided in §§ 73.735-502 and 73.735-506, an employee shall not directly or indirectly solicit or accept anything of monetary value, including gifts, gratuities, favors, entertainment or loans from a person who the employee knows, or should know because of the nature of the employee's work:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the employee's principal operating component, or sub-unit thereof; or with a component of the Department with respect to which the employee has official duties;

(2) Conducts operations or activities that are regulated by the employee's principal operating component, or subunit thereof or by a component of the Department with respect to which the employee has official duties; or

(3) Has interests that may be substantially affected by the performance or non-performance of the employee's official duties.

(b) Employees may not designate a person or an organization, including charitable or non-profit organizations, to accept any gift which an employee is prohibited from accepting directly.

§ 73.735-502 Permissible acceptance of gifts, entertainment and favors.

(a) An employee may accept a gift, gratuity, favor, entertainment, loan or similar favor of monetary value which stems from a family relationship such as that between the employee and his or her parents, spouse or children, if it is clear that the relationship is the motivating factor.

(b) Loans from banks or other financial institutions may be accepted on customary terms.

(c) Unsolicited advertising or promotional material such as pens, note pads, calendars and similar items of nominal intrinsic value may be accepted.

(d) An employee may accept food or refreshment of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or on an inspection tour only if the employee is properly in attendance and there is not a reasonable opportunity to pay.

Example 1: Employee is on the premises of Company participating in a meeting at a normal mealtime. A representative of Company provides a meal for all meeting participants from a Company facility and there is no established method for payment. Employee may accept.

Example 2: Employee is on the premises of Company and he or she goes outside for lunch with a representative of the Company. The representative offers to pay the bill. Since it is practical for the employee to pay for his or her own meal, the employee may not accept.

(e) An employee may also accept food or refreshment of nominal value on infrequent occasions if the food and/or refreshment is offered to all participants or attendees of a meeting or convention.

Example 1: During the course of a convention of a professional organization a luncheon open to all attendees is sponsored by a corporation which conducts business with the Department and the employee has official dealings with representatives of the corporation. The employee may attend the luncheon.

§ 73.735-503 Criminal provisions relating to gifts, entertainment, and favors.

(a) The law provides criminal penalties for whoever, directly or indirectly:

(1) Receives or accepts anything of value for or because of any official act the employee has performed or will perform; or

(2) Gives, offers or promises anything of value for the performance of an official act or to influence the performance of an official act. 18 USC 201.

(b) The law prohibits an employee from receiving any salary or any contribution to, or supplementation of, his or her salary as compensation for services as an officer or employee of the Government from any source other than the United States or any state, county or municipality. This law does not prohibit an employee from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus or other employee welfare or benefit plan maintained by a former employer. 18 U.S.C. 209.

Example 1: A corporate executive is asked to accept a position in the Department. The corporation offers to continue to pay the executive the difference between his or her salary as a Government employee and that received by an employee of the corporation. Such payment would be considered to be "compensation for" the employee's Government service and is prohibited.

Example 2: A corporate executive is asked to accept a position in the Department. The corporation proposes to pay him or her a special severance payment in anticipation of this or her serving in the Government. This proposal would be prohibited because there is no distinction between the proposed lump-sum payment and the prohibited continuation of salary payments described in the example above.

Example 3: A corporate executive is asked to accept a position in the Department. The corporation has an established policy which provides for an amount of severance pay to be paid any departing executive and proposes to make payment based on that policy when the executive leaves. The executive may accept the payment. Under these circumstances it is clear that the severance pay is in payment for past services not in anticipation of the future services for the Government.

§ 73.735-504 Gifts to official superiors.

An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself or herself. 5 U.S.C. 7351. This section does not prohibit a voluntary gift of nominal value or donation in nominal amount made on a special occasion such as marriage, illness or retirement.

§ 73.735-505 Acceptance of awards and prizes.

(a) Employees may accept awards, including cash awards, given in recognition of a meritorious public contribution or achievement. However, if there is any indication that the award may improperly influence the employee in the performance of his or her offical duties, advice about the acceptance of it should be sought from a deputy ethics counselor. Also, an employee may not accept an award from an organization which the employee knows, or should know, has a contractual or other business arrangement with, or is regulated by, the principal operating component, or a sub-unit, in which he or she is employed or with respect to which the employee has official duties, unless acceptance is approved by the head of the employee's principal operating component. The head of the component may not approve acceptance unless he or she is satisfied that no actual conflict of interest would result.

(b) Employees may generally accept trophies, entertainment, rewards, and prizes given to competitors in contests or events which are open to the public.

(c) Employees may not accept gifts, awards, decorations or other things of value from a foreign government except as provided in § 73.735-506.

§ 73.735-506 Gifts and decorations from foreign governments.

(a) An employee may not request or otherwise encourage the tender of a gift or decorations from a foreign government or official thereof.

(b) An employee may accept from a foreign government:

(1) A gift which is in the nature of medical treatment or an educational scholarship;

(2) A tangible gift of minimal value tendered or received as a mark of courtesy; ("Minimal value" means a retail value in the United States at the time of acceptance of not more than one hundred dollars, unless the Administrator of the General Services Administration adjusts the value by regulation.) or

(3) A tangible gift of more than minimal value when it appears that to refuse the gift would be likely to cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. However, the acceptance of such a gift would be on behalf of the United States and the gift would become the property of the United States. See the Department's General Administration Manual, Chapter 20-25 for information regarding the disposition of a gift accepted under these circumstances.

(c) An employee may also accept from a foreign government gifts of travel or expenses for travel (such as transportation, food and lodging) that take place entirely outside the United States and are of more than minimal value, if such acceptance is consistent with the interests of the United States and is approved by the travel approving authority in accordance with the Department's Travel Manual. See General Administration Manual, Chapter 20-25 for a requirement to report such travel.

(d) An employee may accept, retain, and wear a decoration tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance, subject to the approval of the Secretary or his or her designee.

(e) Members of an employee's family and household are also subject to the regulations in this section. A member of an employee's family and household is a relative by blood, marriage or adoption who is a resident of the household. However, if a member of an employee's family and household is employed by another agency of the Government, the offer or acceptance of a gift shall be treated under the regulations of that agency.

(f) For purposes of this section "foreign government" means:

(1) Any unit of foreign government authority including any foreign national, state, local and municipal government;

(2) Any international or multinational organization whose membership is composed of any unit of foreign government described in subparagraph (1); or

(3) Any agent or representative of any such unit or organization when acting as such agent or representative. (5 U.S.C. 7342)

§ 73.735-507 Acceptance of travel and subsistence

(a) Except as provided in (b) of this section, employees may accept accommodations, subsistence, and travel in cash or in kind in connection with official travel for attendance at meetings, conferences, training in non-Governmental facilities or for performing advisory services, if approved in accordance with the provisions of the HHS Travel Manual. (5 U.S.C. 4111; 42 U.S.C. 3506)

(b) Employees may not accept accommodations, subsistence, or travel in cash or in kind in connection with official travel from a non-Governmental source with which they have official dealings unless Government or commercial travel and/or accommodations are not available. If travel and/or subsistence is accepted for official travel under these circumstances, such acceptance and the basis for it must be reported in writing to the Head of the Principal Operating Component or Assistant Secretary for Management and Budget for the Office of the Secretary.

§ 73.735-508 Other prohibitions.

Employees shall avoid any action whether or not specifically prohibited by this Part, which might result in or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality in the performance of their Government duties;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

Subpart F—Political Activity

§ 73.735-601 Applicability.

(a) All employees in the Executive Branch of the Federal Government, including non-career employees, are subject to basic political activity restrictions in subchapter III of Chapter 73 of title 5, United States Code (the former Hatch Act) and Civil Service Rule IV. Employees are individually responsible for refraining from prohibited political activity. Ignorance of a prohibition does not excuse a violation. This subpart summarizes provisions of law and regulation concerning political activity of employees. The Federal Personnel Manual and other publications of the Office of Personnel Management contain more detailed information on this subject. These may be reviewed in Department personnel offices, or will be made available by the Ethics Counselor, or the deputy counselor for the employee's organizational component.

(b) The Secretary and Under Secretary are exempt from the prohibitions concerning active participation in political management and political campaigns. Also exempt are other officials of the Department, except the Inspector General and Deputy Inspector General, who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in the nationwide administration of Federal laws.

(c) Intermittent employees are subject to the restrictions when in active duty status only and for the entire 24 hours of any day of actual employment.

(d) Employees on leave, on leave without pay, or on furlough even though an employee's resignation has been accepted, are subject to the restrictions. Separated employees who have received a lump-sum payment for annual leave are not subject to the restriction during the period covered by the lump-sum payment or thereafter, provided they do not return to Federal employment during that period. Employees are not permitted to take a leave of absence to work with a political candidate, committee, or organization or to become a candidate for office with the understanding that they will resign their position if nominated or elected.

(e) Employees are accountable for political activity by another person acting as their agent or under the employee's direction or control, if they are thus accomplishing indirectly what they may not lawfully do directly and openly.

(f) Though officers in the Public Health Service Commissioned Corps are not subject to the restrictions in subchapter III of Chapter 73 of title 5, United States Code, the provisions of this subpart apply to them.

§ 73.735-602 Permissible activities.

(a) Section 7324 of title 5, U.S.C. provides that employees have the right to vote as they please and to express their opinions on political subjects and candidates. Generally, however, employees are prohibited from taking an active part in political management or political campaigns or using official authority or influence to interfere with an election or affect its results. There are some exemptions from the restrictions of the statute:

(1) Employees may engage in political activity in connection with any question not specifically identified with a national or State political party. They also may engage in political activity in connection with an election, if none of the candidates represents a party any of whose candidates for presidential elector received votes at the last preceding election at which presidential electors were selected.

(2) An exception relates to political campaigns within, or in communities adjacent to, the District of Columbia, or in communities the majority of whose voters are employees of the Federal government. Communities to

which the exception applies are specifically designated by the Office of Personnel Management. Information regarding the localities and the conditions under which the exceptions are granted may be obtained from personnel offices or the Department Counselor or deputy counselors.

(b) A covered employee is permitted to:

(1) Register and vote in any election;

(2) Express his or her opinion as an individual citizen privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fund raising function; or other political gathering;

(7) Sign a political petition as an individual citizen;

(8) Make a financial contribution to a political party organization;

(9) Take an active part, as an independent candidate, or support of an independent candidate, in a partisan election in localities identified as permissible for such activities by the Office of Personnel Management;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his or her agency.

(c) The head of a principal operating component may prohibit or limit the participation of an employee or class of employees of his or her component in an activity permitted by paragraph (b) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interest.

§ 73.735-603 Prohibited activities.

(a) The following are prohibited activities:

(1) Serving as an officer of a political party, a member of a national, State or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose or in connection with a partisan election;

(4) Organizing, selling tickets to, seeking support for, or actively participating in a fund-raising activity of, a political party or political club;

(5) Taking an active part in managing the political party campaign of a candidate for public office or political office;

(6) Being a candidate for, or campaigning for, an elective public office, except as permitted in § 73.735-602(b)(9);

(7) Taking an active part in an organized solicitation of votes in support of or in opposition to a candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or candidate in a partisan election;

(9) Driving voters to the polls on behalf of a political paty or a candidate in a partisan election;

(10) Endorsing or opposing a candidate in a partisan election in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a State or national convention or caucus, or a rally or similar gathering of a political party, in support of or in opposition to a candidate for public or political party office, or on a partisan political question; and

(13) Initiating or circulating a nominating petition for a candidate in a partisan election.

(b) In addition, certain political activities are prohibited by Federal criminal law:

(1) Officers and employees may not directly or indirectly solicit or receive, or be in any way involved in soliciting or receiving, any assessment, subscription or contribution for any political purpose whatever from another officer or employee. This prohibition extends to one who acts as a mere agent or messenger for the purpose of turning the contribution over to a political organization. 18 U.S.C. 602.

(2) All persons, whether employees or not, are prohibited from soliciting in any manner, or receiving a contribution of, money or a thing of value, in any room or building occupied in the discharge of official duties by any officer or employee of the United States. 18 U.S.C. 603. This prohibition extends to the sending of a letter soliciting political contributions for delivery in a Government building.

(3) No officer or employee may directly or indirectly give to any other officer, employee or person in the service of the United States, any money or other thing of value to be applied to the promotion of any political objective. 18 U.S.C. 607.

(4) Discrimination for giving or withholding any contribution for any political purpose and discrimination based on political influence or recommendations is prohibited.

(c) Various other laws prohibit certain activities in connection with political campaigns and elections. They include:

(1) Intimidating, threatening, or coercing voters in Federal elections (18 U.S.C. 594).

(2) Using official authority in interfering with a Federal election by a person employed in any administrative position by the United States or by any department, independent establishment, or agency of the United States or by any State, agency, or political subdivision thereof in connection with any activity financed in whole or in part by Federal funds (18 U.S.C. 595).

(3) Promising Federal employment, compensation, or any benefit from Federal funds, in return for political activity or support (18 U.S.C. 600).

(4) Depriving anyone of employment, compensation, or any benefit derived from Federal relief or work relief funds on account of race, creed, color, or political activity (18 U.S.C. 601).

(5) Soliciting, assessing, or receiving subscriptions or contributions for political purpose from anyone on Federal relief or work relief (18 U.S.C. 604).

Subpart G—Outside Activities

§ 73.735–701 General provisions.

(a) Outside employment may be appropriate when it will not adversely affect performance of an employee's official duties and will not reflect discredit on the Government or the Department. Such work may include civic, charitable, religious, and community undertakings. There are certain types of outside work, however, which give rise to a real or apparent conflict of interest. Some of these are prohibited by law. Others are prohibited by regulation, as discussed in paragraph (b) of this section, or by criteria developed by heads of operating components for application within a particular component. All of these provisions are binding, but they do not necessarily include all possible conflicts of interest. In all instances, good judgment must be used to avoid a conflict between an employee's Federal responsibilities and outside activities.

(b) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his or her Government employment whether or not in violation of any specific provision of law. Incompatible activities include, but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in any circumstances in which acceptance may result in, or create the appearance of, conflicts of interest;

(2) Outside employment which tends to impair the employee's mental or physical capacity to perform Government duties and responsibilities in an acceptable manner;

(3) Work which identifies the Department or any employee in his or her official capacity with any organization commercializing products relating to work conducted by the Department, or with any commercial advertising matter, or work performed under such circumstances as to give the impression that it is an official act of the Department or represents an official point of view;

(4) Outside work or activity that takes the employee's time and attention during his official work hours.

(c) An employee shall not receive any salary or anything of monetary value from a private source as compensation for services to the Government. For example, a Department employee may be called upon, as a part of his or her official duties, to participate in a professional meeting sponsored by a non-Government organization, or to contribute a paper or other writing prepared on official time for publication under non-Government auspices. The employee must not accept an honorarium or fee for such services, even though the organization accepting the service customarily makes such a payment to those who participate. Nor may the employee accept a contribution to some charity, educational institution, or the like, in appreciation of the services furnished by the Department employee who cannot accept the usual payment. All offers to make such a contribution must be refused. Any employee with whom such a question is raised shall explain that the service involved was provided as an official action of the Department and is authorized by law. Under these circumstances, it is inappropriate for any payment to be made, even indirectly and to a third party, for services which are furnished without charge by the Government.

(d) Other than as provided in (c) of this section, employees may receive compensation or other things of monetary value for any lecture, discussion, writing or appearance the subject matter of which is in part devoted to the responsibility, programs or operations of the Department so long as the activity is undertaken in a personal capacity, is not performed as official duty, is not done while on official time, and does not create a conflict of interest or appearance of conflict of interest. However, such activities are considered outside employment and may be undertaken only as provided in this subpart.

(e) This section does not restrict the acceptance of compensation or other things of monetary value for any lecture, discussion, writing or appearance, the subject matter of which is not devoted to the responsibilities, programs, or operations of the Department and which are undertaken in a private capacity and in accordance with §§ 73.735.704, 705, or 706.

(f) Federal law limits the amount of honorarium that may be paid any employee for any one speech, writing or appearance to $2,000.00 (not to include amounts for actual travel and subsistence expenses for the employee and his or her spouse) and an aggregate of $25,000.00 in any calendar year. This limitation applies to such activities whether or not the subject matter is related to the responsibilities, programs or operations of the Department. (2 U.S.C. 441i) The term "honorarium" means payment of money or other thing of value whether made gratuitously or as a fee for an appearance, speech or article but does not include salary or compensation made for services rendered on a continuing basis, such as for teaching, or as proceeds from the sale of a book or similar undertaking.

(g) An employee who is a Presidential appointee covered by section 401(a) of Executive Order 11222 shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his or her component, or which draws substantially on official data or ideas which have not or will not on request become public information.

(h) Application of these general provisions to some specific activities is discussed below.

§ 73.735–702 Criminal prohibitions on outside activities.

(a) An employee may not, with or without compensation, represent another before any Government agency, court or commission in connection with any proceeding, application, request for a ruling, contract, claim or other particular matter in which the United States is a party or has a direct and substantial interest. (18 U.S.C. 203 and 205)

(b) An employee may not act as agent or attorney for anyone else in prosecuting any claim against the United States (18 U.S.C. 205).

(c) As an exception to the above, if it is not inconsistent with the performance of his or her duties, an employee may act without compensation as an agent or attorney for another employee, or a person under active consideration for Federal employment, who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings at the administrative level. For example, an employee may represent another employee who is the subject of disciplinary action, or the complainant in a discrimination proceeding, at all stages within the Department and before the Merit Systems Protection Board or Equal Employment Opportunity Commission but not in Federal Court. It would be inconsistent with the performance of official duties for a supervisor to represent subordinate employees.

(d) The law and these regulations do not prohibit an employee from acting, with or without compensation, as agent or attorney for his or her parents, spouse, child or any person for whom, or estate for which, he or she is acting as fiduciary provided that the head of the principal operating component or his or her designee approve. Such approval, if granted, must be granted in accordance with the procedures for approval of outside activity. However, the employee may not do so if the particular matter is one in which he or she has participated personally and substantially or which is his or her official responsibility. (18 U.S.C. 205).

§ 73.735–703 Statutory prohibitions related to employment by a foreign government.

Employees, including officers in the Public Health Service (PHS) Commissioned Corps and retired officers of the Regular Commissioned Corps of the PHS, may not, without the consent of Congress, be employed by a foreign government or agency of a foreign government (Art. I, Sec. 9, U.S. Const.). Congress has consented to such employment by Reserve Commissioned Officers of the PHS not on active duty and by Retired Regular Commissioned Officers (37 U.S.C. 801, note) if approved under regulations of the Department of State. 22 CFR Part 3a.

§ 73.735–704 Professional and consultative services.

(a) Employees may engage in outside professional or consultative work only after meeting certain conditions. Except as provided in §§ 73.735–705 and 73.735–706 for activities discussed in those sections, the conditions which must be met are:

(1) The work is not to be rendered, with or without compensation, to organizations, institutions, or state or local governments with which the official duties of the employee are directly related, or indirectly related if the indirect relationship is significant enough to cause the existence of conflict or apparent conflict of interest; or

(2) The work is not to be rendered for compensation to help a person, institution, or government unit prepare or aid in the preparation of grant applications, contract proposals, program reports, and other material which are designed to become the subject of dealings between the institutions or government units and the Federal Government. All requests to perform consultative services, either compensated or uncompensated, for institutions or government units which have recently negotiated or may in the near

future seek a contract or grant from this Department must be carefully appraised to avoid any conflict or apparent conflict of interest.

(b) Advance administrative approval in accordance with § 73.735–708 of this subpart must be obtained. Such approval is required whether or not the services are for compensation, and whether or not related to the employee's official duties.

(c) For the purpose of this section, "professional and consultative work" is performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, or hospital which requires the exercise of judgment and discretion in its performance and is primarily intellectual in nature as opposed to manual, mechanical or physical work.

(d) Membership on a Board of Directors, Board of Regents, Board of Trustees, Planning Commission, Advisory Council or Committee, or on any similar body which provides advice, counsel, or consultation, shall be considered outside consultative services for which advance administrative approval is required.

§ 73.735–705 Writing and editing.

(a) Employees are encouraged to engage in outside writing and editing whether or not done for compensation, when such activity is not otherwise prohibited. Such writing and editing, though not a part of official duties, may be on a directly related subject or entirely unrelated. Certain conditions must be met in either case, however, and certain clearances or approvals are prescribed according to the content of the material as set forth in paragraphs (b) through (e) of this section.

(b) Conditions applying to writing and editing done not as a part of official duties.

(1) The following conditions shall apply to all writing and editing whether related or unrelated to the employee's official duties:

(i) Government-financed time or supplies shall not be used by the author or by other Government employees in connection with the activity; and

(ii) Official support must not be expressed or implied in the material itself or advertising or promotional material, including book jackets and covers, relating to the employee and his or her contribution to the publication.

(2) If the writing or editing activity is unrelated to the employee's official duties or other responsibilities and programs of the Federal government, the employee must:

(i) Make no mention of his or her official title or affiliation with the Department, or

(ii) Use his or her official title or affiliation with the Department in a way that will not suggest or convey official endorsement of the work.

(3) If the writing or editing activity is related to the employee's official duties or other responsibilities and programs of the Federal government, the employee must:

(i) Make no mention of his or her official title or affiliation with the Department, or

(ii) Use his or her official title or affiliation with the Department and a disclaimer as provided in paragraph (e) of this section, or

(iii) Submit the material for clearance within the operating component, under procedures established by the component. When clearance is denied at any lower level, the employee shall have recourse for review up to the head of the principal operating component. This clearance will show there are no official objections to the activity and the employee may then use his or her official title or affiliation with the Department usually without a disclaimer.

(c) *Disclaimers.* (1) Except where the requirement for disclaimer is waived as a result of official clearance, disclaimers shall be used in all writing and editing related to the employee's official duties or other responsibilities and programs of the Federal government:

(i) In which the employee identifies himself or herself by official title or affiliation with the Department, or

(ii) When the prominence of the employee or the employee's position might lead the public to associate him or her with the Department, even without identification other than name.

(2) Disclaimers shall read as follows unless a different wording is approved by the Assistant General Counsel, Business and Administrative Law Division, Office of the General Counsel: "This (article, book, etc.) was (written, edited) by (employee's name) in (his or her) private capacity. No official suport or endorsement by (name of operating component or of Department) is intended or should be inferred."

(d) Advance approval. Advance approval is required in accordance with § 73.735-708 of this subpart when one or more of the following conditions apply:

(1) Any Government information is used which is not available on request to persons outside the Government;

(2) Material is written or edited which pertains to subject matter directly related to an employee's official duties; (This includes editing for scientific or professional journals which is related to his or her official duties.)

(3) Material is written or edited which pertains to any Government-sponsored research or other studies for which clinical case records or other material of a confidential nature are used or to which access is limited for persons outside the Government. Such use will not be permitted unless made under safeguards established by the operating component to retain the confidentiality of the material, and such use is determined to be in the public interest.

§ 73.735–706 Teaching, lecturing, and speechmaking.

(a) Employees are encouraged to engage in teaching and lecturing activities which are not part of their official duties when certain conditions are met. These conditions, which apply to outside teaching and lecturing (including giving single addresses such as commencement and Memorial Day speeches) whether or not done for compensation, are:

(1) No Government-financed time, or Government supplies not otherwise available to the public, are used in connection with such activity;

(2) Government travel or per diem funds are not used for the sole purpose of obtaining or performing such teaching or lecturing;

(3) Such teaching or lecturing is not dependent on specific information which would not otherwise be available to the public;

(4) Teaching, lecturing, or writing may not be for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or Board of Examiners for the Foreign Service, that depends on information obtained as a result of the employee's Government employment, except when that information has been made available to the general public or will be made available on request;

(5) Such activities do not involve knowingly instructing persons on dealing with particular matters pending before Government organizations with which the employee is associated in an official capacity;

(6) Advance approval is obtained when required by paragraph (b) of this section.

(b) Advance approval. Advance approval must be obtained in accordance with § 73.735-708 of this subpart before an employee may:

(1) Teach or lecture for an institution which has or is likely to have official dealings with the bureau or comparable organizational unit in which he or she is employed;

(2) Use, for teaching or lecturing purposes, clinical case records or other material of a confidential nature or to which access is limited for persons outside the Government. Such use will not be permitted unless made under safeguards established by the operating component to retain the confidentiality of the material, and such use is determined to be in the public interest.

§ 73.735–707 Holding office in professional societies.

(a) Employees may be members of professional societies and be elected or appointed to office in such a society. Activity in professional associations is generally desirable from the point of view of both the Department and the employee. Employees shall avoid, however, any real or apparent conflict of interest in connection with such membership. For example, they must not:

(1) Directly or indirectly commit the Department or any portion of it on any matter unless such action is taken in an official capacity;

(2) Permit their names to be attached to documents the distribution of which would be likely to embarrass the Department; or

(3) Serve in capacities involving them as representatives of non-Government organizations in dealing with the Government.

(b) In undertaking any office or function beyond ordinary membership in a professional association, a Department employee must obtain advance approval in accordance with § 73.735-708 of this subpart in any situation in which his or her responsibilities as an officer would relate to his or her official duties or would create a real or apparent conflict of interest with responsibilities as a Department employee. For example, advance administrative approval must be obtained:

(1) Before an employee who is responsible for review and approval of grants or contracts, or is in a supervisory position over those who conduct review and approval, may hold office, or be a trustee or member of the governing board, or the chairman or member of a committee, in any organization which has or is seeking a grant or contract with the bureau or comparable organizational unit in which he or she is employed;

(2) Before an employee may hold office in an organization which customarily expresses publicly views on matters of legislative or administrative policy within the specific areas of concern to the Department.

§ 73.735-708 Administrative approval of certain outside activities.

(a) *Scope.* As specified in § 73.735-704 through 707, an employee is required to obtain advance administrative approval to engage in the following outside activities:

(1) Certain writing or editing activities;

(2) Certain types of teaching and lecturing;

(3) All professional and consultative services;

(4) Any other outside activity for which the head of a principal operating component or the head of a subunit of a principal operating component imposes internal requirements for administrative approval; and

(5) Certain office-holding activities in professional societies.

(b) *Requests for Administrative Approval.* An employee seeking to engage in any of the activities for which advance approval is required shall make a written request for administrative approval a reasonable time before beginning the activity. (See § 73.735-202(e)(1)). This request should be directed to the employee's supervisor who will forward it to the official authorized to approve outside work requests for the employee's component. The request should include the following information:

(1) Employee's name, position title, grade or rank;

(2) Nature of the activity, fully describing the specific duties or services for which approval is requested;

(3) Name and business of person or organization for which work will be done, or statement that work will be self-employment. If self-employment, employee must state whether activity will be conducted alone or with partners;

(4) Place where work will be performed;

(5) Estimated total time to be devoted to activity. If on a continuing basis, indicate estimated time per year and the anticipated termination date;

(6) Whether services can be performed entirely outside of usual duty hours. If not, the estimated number of hours absent from work should be indicated;

(7) Method or basis of compensation if any (e.g., fee, per diem, per annum, or other).

(8) Where an employee seeks approval to provide consultative or professional services to organizations including governments which have been awarded or may apply for a Federal grant or contract, the request shall also include full details on any aspect of the professional and consultative services which could relate in any way,

either directly or indirectly, to grant applications, contract proposals, program reports, and other material which are designed to become the subject of dealings between the grantee or contractor and the Government. (See § 73.735-704(a)(2))

(c) The Department Ethics Counselor will review and approve outside work requests for Executive level officers, non-career executives, deputy ethics counselors, and Schedule C employees in the Office of the Secretary.

(d) *Granting Approval of Certain Activities.* The approving official shall review each request submitted under (b) of this section, and appraise each request on the basis of the standards of this Part and all other applicable laws, regulations or internal rules of the principal operating component or sub-unit thereof. He or she should consult with a deputy ethics counselor or the Department Ethics Counselor in all cases that raise a difficult or novel question of law or fact. The approving official shall approve or disapprove each request and communicate his or her decision in writing to the employee.

§ 73.735-709 Annual reporting of outside activities.

By September 10 of each year the approving official shall require a report from each person for whom outside work has been approved during the past year. The report shall show:

(a) For the 12 months just past (ending August 31):

(1) Whether the anticipated work was actually performed for the person or organization named in the request for approval;

(2) Actual amount of time spent on the activity.

(b) For the forthcoming 12 months (ending August 31):

(1) Whether it is anticipated that the outside work will continue;

(2) Whether any change is anticipated with respect to information supplied in accordance with the original request on which approval was based.

§ 73.735-710 Maintenance of records.

The official responsible for the administrative aspects of these regulations (§ 73.735-202) shall make provisions for the retention and filing of requests for approval of outside work (or copies of such requests), a copy of the notification of approval or disapproval, and the annual report.

Subpart H—Financial Interests

§ 73.735-801 Participation in matters affecting a personal financial interest.

(a) An employee shall not participate personally and substantially as a Government employee in a matter in which any of the following individuals or organizations has a financial interest:

(1) The employee;

(2) The employee's spouse;

(3) The employee's minor child;

(4) An organization in which the employee serves as an officer, director, trustee, partner, or employee; or

(5) A person or organization with which the employee is negotiating for prospective employment or has an arrangement for prospective employment. Criminal penalties may be imposed under 18 U.S.C. 208 for violations of the prohibition.

(b) Applying the provision of 18 U.S.C. 208:

(1) A "financial interest" is any interest of monetary value which may be directly and predictably affected by the official action of an employee. There is no minimum amount of value or control that constitutes a financial interest.

Example 1: An employee owns a single share of stock in a widely-held corporation. If the corporation is likely to be affected by a matter in which the employee participates as a Government official, the employee may violate 18 U.S.C. 208.

Example 2: An employee has a paid part-time position with a non-federal organization. If the organization is likely to be affected by a matter in which the employee participates as a Government official, the employee would violate 18 U.S.C. 208.

(2) The prohibition of 18 U.S.C. 208 applies to personal and substantial involvement by an employee in a matter, exercised through decision, approval, disapproval, recommendation, investigation, giving advice, or other significant effort regarding the matter.

Example 1: An employee is a member of a panel that evaluates proposals for contracts and makes recommendations as to their award. If the employee's spouse owns stock in a company which submits a proposal that is reviewed by the panel, the employee would violate 18 U.S.C. 208 even though the panel recommendation may be rejected by the contracting officer.

Example 2: An employee is on a leave of absence from a university. He or she would violate 18 U.S.C. 208 by participating in the drafting of regulations which would have a "direct and predictable effect" upon universities in general and, therefore, upon the employee's university.

(3) An employee must know that the financial interest exists in order to violate 18 U.S.C. 208.

Example: An employee inherited a beneficial interest in a trust. He or she does not, however, have actual knowledge of the specific property held by the trustee. If the trust contains stock in a corporation which may be affected by the employee's official actions, he or she would not violate 18 U.S.C. 208 in taking official action affecting the corporation.

(4) Negotiation for prospective employment includes both an indication of interest on the part of the employee in working for an organization and an affirmative action on the part of the organization to show consideration of the employee.

Example 1: An employee of the Department sends resumes and cover letters to fifty prospective employers, all of whom regularly have dealings with HHS. Forty employers do not respond; however, ten respond with cordial form letters stating that the employee's resume will be retained for future reference. For purposes of the 18 U.S.C. 208 prohibition, the employee is negotiating for prospective employment at the time he or she sends resumes.

Example 2: At a site visit to a grantee institution, an employee who is officially responsible for a grant to that institution informs an officer of the institution that he or she is seeking a new position outside HHS. The grantee subsequently makes a conditional offer of employment to the employee who promptly responds by asking for an opportunity to discuss salary and related matters. Under these circumstances, a negotiation for prospective employment is underway.

(c) An employee may obtain approval to participate in his or her official capacity in a matter in which he or she has a direct or indirect financial interest, if the interest is not so substantial as to affect the integrity of his or her official duties. An employee who believes that such participation is warranted should follow the procedures in § 73.735-804.

(d) An employee convicted of violating 18 U.S.C. 208 may be fined up to $10,000, or imprisoned up to two years, or both.

§ 73.735-802 Executive order prohibitions.

(a) *Basic prohibition of Executive Order 11222.* (1) An employee shall not have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his or her duties as a Federal employee.

(2) An employee need not have a financial interest that actually conflicts with his or her duties to violate the prohibition of E.O. 11222. Any financial interest that could reasonably be viewed as an interest which might compromise the employee's integrity, whether or not this is in fact true, is subject to this prohibition.

(3) Except as provided in § 73.735-802 (b) and (c), an employee who has an indirect financial interest in a business entity through the ownership of shares in a widely-held mutual fund or other regulated investment company will not violate E.O. 11222. Stocks in business entities held by an intermediary such as a mutual fund are generally too remote or inconsequential to affect the integrity of an employee's services.

(b) *Employees in regulatory activities.* (1) An employee who is working in a regulatory activity shall not have a financial interest in any company whose business activities are subject to the regulations of the particular activity with which the employee is associated, unless the regulated activities of the company are an insignificant part of its total business operations.

(2) An employee working in a regulatory activity may not hold shares in a mutual fund or other regulated investment company which specializes in holdings in industries that are regulated by the particular activity in which he or she is employed.

Example: An employee working for the Bureau of Laboratories, Center for Disease Control, may not hold shares in a regulated investment company which specializes in holdings that include medical testing laboratories.

(c) Employees having procurement or contracting responsibilities.

(1) An employee who serves as a procurement or contracting officer shall not have a financial interest in a company or companies with which he or she in the course of his or her official duties would be likely to have procurement or contracting relationships.

(2) A procurement or contracting officer may not hold shares in a mutual fund or other regulated investment company that specializes in holdings in industries with which such officer would be likely to have procurement or contracting relationships.

Example: A contracting officer in the Social Security Administration owns shares in the XYZ Mutual Fund which specializes in stock in firms manufacturing electronic data processing equipment. Ownership of XYZ Mutual Fund shares would be prohibited in this instance. On the other hand, a contracting officer for a Public Health Service hospital, who is not likely to have responsibility for major contracts relating to electronic data processing, could hold such shares.

§ 73.735-803 Prohibition against involvement in financial transactions based on information obtained through federal employment.

An employee shall not engage in, directly or indirectly, a financial transaction as a result of, or in primary reliance upon, any information gained through his or her official duties. Information gained through official duties are those facts and other data that relate to the employee's official duties or to the functions of the employing component and would not be available to the employee were he or she not an officer of the Federal government.

Example 1: An employee working parttime for a consulting firm that does no busines with the employee's principal operating component, in the area of health care planning advises it, based upon his or her knowledge of a new health care planning program about to be initiated by the Public Health Service. The employee's knowledge of the program was acquired solely through reading policy statements and other PHS literature available to the public under the Freedom of Information Act. In such case, the employee would not violate this regulation if the outside activity was otherwise approvable under Subpart G.

Example 2: A contracting officer with detailed knowledge of a negotiated procurement contract invests in a corporation that is likely to indirectly profit from the award of that contract. The officer's decision to invest is based upon technical details of the successful contract proposal that would not otherwise be available to a private citizen. The officer would violate this regulation in such a situation.

§ 73.735-804 Waiver of the prohibitions in this subpart.

(a) An employee may request approval to participate in his or her official capacity in a matter in which he or she has a direct or indirect financial interest if the employee believes the interest is so remote and inconsequential that it would not affect the integrity of his or her official duties. Also an employee who has a financial interest that would otherwise be prohibited under these regulations may request an exemption from the prohibition for the reason stated in the preceding sentence.

(b) The request shall be in writing and shall include the following information:

(1) Employee's name, occupational title, grade or rank and Federal salary;

(2) Full description of financial interest: including whether ownership, service as officer, partner, etc.;

(3) Business or activity in which financial interest exists;

(4) Description of official matter in which employee is requesting approval to participate;

(5) Basis for requesting determination that the interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect." (If based on a small total value of investment, supply appropriate information on total value, such as total shares held and latest quoted market price. If other basis, explain fully.)

The request should be sent through usual administrative channels to the official responsible for reviewing financial disclosure reports or statements for the employee's organization (Subpart I). That official, after conferring with a deputy ethics counselor or with the Department Ethics Counselor as appropriate, will make a decision about the exemption or exception and inform the employee in writing.

§ 73.735-805 Advice and guidance on conflicts matters.

(a) Whenever an employee has a question about the appropriate course of conduct to be followed in a matter that may involve an actual or apparent conflict of interest, he or she should immediately consult with his or her supervisor or a deputy ethics counselor, or both. If a supervisor who is consulted determines that the matter warrants further consideration, he or she may, in conjunction with the employee, submit the details of the matter, in writing, to the appropriate deputy ethics counselor. These details should include a description of:

(1) The activity, relationship, or interest giving rise to the question posed by the employee;

(2) The duties or official responsibilities of the employee(s) involved;

(3) The nature of the actual or apparent conflict of interest; and

(4) Any other information that may be helpful in reviewing the problem.

(b) Upon receiving the submission of an employee or a supervisor, the deputy ethics counselor will develop any additional information about the matter as necessary, and will confer with the Department Ethics Counselor as appropriate. The Department Ethics Counselor and the head of the principal operating component or his or her designee will be informed of any serious violation of the standards of this subpart or any other conflict of interest law. Questions of first impression or other unusual matters shall be brought to the attention of the Department Ethics Counselor and the head of the principal operating component or his or her designee.

(c) On the basis of all information gathered including, where appropriate, the advice of the Department Ethics Counselor, the deputy ethics counselor will:

(1) Decide that there is no violation or potential violation of the standards of this subpart or any other law and so notify the employee and his or her supervisor in writing; or

(2) Decide that a violation or potential violation of the standards of this subpart or other law has occurred or may occur, and that the employee involved shall take one or more of the steps set forth in § 731.735-904 to resolve the problem and notify the employee and his or her supervisor in writing; or

(3) Decide that, although no violation of this subpart or other law has occurred, the nature of the matter is such that the employee should periodically report any additional information that would require reconsideration of the initial submission.

§ 73.735-806 Documentation and publication of opinions.

(a) The Department Ethics Counselor, deputy ethics counselors, and any other individuals required to be involved in the review and resolution of violations or potential violations of this subpart shall maintain full and accurate documentation of the formal advice and guidance given.

(b) From time to time, the Department Ethics Counselor shall publish summaries of advisory opinions issued by his or her office, deleting, as necessary, any personal identifiers or other information which may give rise to an unwarranted invasion of personal privacy. These summaries shall be distributed to all deputy ethics counselors, heads of principal operating components, and principal regional officials.

(c) From time to time, the Department Ethics Counselor shall publish an index of all summaries issued in accordance with paragraph (b) above and shall distribute these indexes to all deputy ethics counselors and heads of principal operating components who shall in turn make them available for review by supervisors and interested employees.

Subpart I—Reporting Financial Interests

§ 73.735-901 Reporting requirement of the Ethics in Government Act of 1978.

(a) *Applicability.* The following employees and special Government employees shall submit public financial disclosure reports in accordance with the provisions of Title II of the Ethics in Government Act of 1978, Pub. L. 95-521, as amended:

(1) Officers and employees (including consultants who will work more than 60 days in a calendar year) whose positions are classified at GS-16 or above of the General Schedule, or whose basic rate of pay (excluding "step" increases) under other pay schedules is equal to, or greater than, the rate for GS-16 (step 1);

(2) Members of the uniformed services whose pay grade is 0-7 or above;

(3) Officers and employees in any other positions determined by the Director of the Office of Government Ethics to be of equal classification to GS-16;

(4) Administrative Law Judges;

(5) Employees in the excepted service in positions which are of a confidential or policy-making character, unless their position has been excluded by the Director of the Office of Government Ethics;

(6) Department Ethics Counselor; and

(7) Deputy Ethics Counselors.

An employee who thinks that his or her position has been improperly included under the reporting requirements of this Part may obtain a review of that determination by writing to the Department Ethics Counselor.

(b) *Filing Dates.* Employees listed in § 73.735-901 (a) of this subpart shall file a financial disclosure report:

(1) Within 5 days after the transmittal by the President to the Senate of their nomination to a position requiring Senate confirmation, or

(2) Within 30 days after assuming a covered position not requiring Senate confirmation unless the employee has left another covered position listed in § 73.735-901 (a) of this subpart, or

(3) Within 30 days after terminating Federal employment or assuming a position which is not listed in § 73.735-901 (a) of this subpart; and

(4) By May 15 of each calendar year, unless the employee has in that calendar year already submitted a financial disclosure report covering the preceding calendar year.

(c) *Submission of reports.* (1) Executive level officers, non-career executives, deputy ethics counselors and Schedule C employees in the Office of the Secretary who are required to report in accordance with § 73.735-901 (a) of this subpart shall submit their reports to the Department Ethics Counselor.

(2) All other employees required to report in accordance with § 73.735-901 (a) of this subpart shall submit their reports to the reviewing official for their organizational component under procedures described in the Department's Personnel Manual. Personnel offices will keep a list of reviewing officials and will give each covered employee the name of the official to whom his or her report should be sent.

(d) *Review and certification of reports.* (1) Each report submitted in accordance with this section shall be reviewed by the appropriate reviewing official within 60 days of its receipt. Upon reviewing a report and finding that the information contained therein reveals no conflict of interest or other violation of any provision of this Part or applicable law, the reviewing officer shall certify the report with his or her signature.

(2) The certification of a report filed in accordance with this section shall have the concurrence of the Office of the General Counsel.

(3) Action to be taken by the reviewing official if the individual is not in compliance with applicable laws and regulations is discussed in § 73.735-903 and § 73.735-904.

§ 73.735-902 Reporting requirements for certain employees not covered by the Ethics in Government Act of 1978.

(a) *Applicability.* The following employees and special Government employees shall submit confidential statements of employment and financial interests in accordance with the provisions of this subpart, provided they are not required to submit financial disclosure reports under § 73.735-901. A list of the positions in this Department whose incumbents are required to file financial interest statements as prescribed by this subpart is available for review in all of the Departments servicing personnel offices.

(1) Officers and employees in positions classified at GS-13 or above (or comparable pay level) who have decision-making responsibility for the following matters:

(i) Contracting or procurement,

(ii) Administering or monitoring grants or subsidies,

(iii) Regulating or auditing private or other non-Federal enterprises, or

(iv) Other activities where the decision or action would have an economic impact on the interest of any non-Federal enterprise.

(2) Incumbents of any other positions designated by the head of the principal operating component, or by the Assistant Secretary for Management and Budget for the Office of the Secretary, to report employment and financial interests in order to protect the integrity of the Government and to avoid possible conflicts of interest. The designation of any such positions below the GS-13 grade must be approved by the Office of Personnel Management.

(3) All experts, consultants, or advisory committee members who are not required to submit a public financial disclosure report in accordance with the Ethics in Government Act except:

(i) Doctors, dentists and allied medical specialists performing services for, or consulted as to the diagnosis or treatment of, individual patients; or

(ii) Veterinarians performing services for or consulted as to care and service to animals.

(b) *Filing dates.* (1) Experts, consultants, and advisory committee members shall file a confidential Statement of Employment and Financial Interest no later than the date employment commences and shall file supplemental statements as necessary to keep all information submitted current and accurate.

(2) Other individuals covered by § 73.735-902 (a) of this subpart shall:

(i) File a confidential statement no later than 30 days after assuming a covered position unless the employee, within 30 days before assuming the position, left another covered position in HHS that is included in § 73.735-901(a) or § 73.735-902(a) of this subpart; and

(ii) Report changes in or additions to the information in the statement as of June 30 of each calendar year, or a different date set by employee's component with authorization by the Office of Personnel Management.

(c) *Submission and review of financial statements.* (1) Heads of principal operating components, the Assistant Secretary for Management and Budget, and principal regional officials for employees under their appointing authority shall establish procedures to ensure that financial statements from covered employees are received and updated on a timely basis and are referred to the appropriate reviewing officials for review and certification. (See § 73.735-202 (e)(1)).

(2) The reviewing official shall review statements to determine whether conflicts of interest or apparent conflicts might arise from the activities reported thereon. If the review discloses no conflict or apparent conflict, the reviewing official shall certify the statement with his or her signature. Action to take if the individual is not in compliance with applicable laws and regulations is discussed in § 73.735-903 and § 73.735-904.

§ 73.735-903 Action if conflicts of interest or possible conflicts are noted.

(a) If after reviewing a financial disclosure report or a financial interest statement, a reviewing official believes that additional information is needed, he or she shall tell the individual submitting such report what additional information is required and the time by which it must be submitted.

(b) If the reviewing official is of the opinion that, on the basis of information submitted, the reporting individual is not in compliance with applicable laws and regulations, he or she shall notify the individual, afford him or her a reasonable opportunity for a written or oral response, and after consideration of such response, determine whether or not the individual is in compliance.

(c) If the reviewing official determines that an individual is not in compliance with applicable laws and regulations, he or she shall notify the individual of that determination in writing and, after an opportunity for personal consultation, determine and notify the individual of the action, including those actions set forth in § 73.735-904, that would be appropriate to assure compliance with such laws and regulations, and the date by which such action should be taken. The action required and the date for taking it shall be determined by the nature of the financial interest or other relationship, the particular circumstances of the reporting individual (including his or her ability to resolve the problem), and other factors which the reviewing official deems relevant. In no case, however, should the date be later than 90 days after the reporting individual is notified of the reviewing official's opinion.

(d) If steps for assuring compliance with applicable laws and regulations are not taken by the date set in paragraph (c), the matter shall be referred to the Department Ethics Counselor.

§ 73.735-904 Resolution of apparent or actual conflicts of interest.

(a) Disqualification from participating in a particular matter or category of matters is an appropriate method for resolving apparent or actual conflicts of interest when the interest or activity giving rise to the problem:

(1) Bears a direct or indirect relationship to particular, identifiable duties of the employee involved; and

(2) Is not so substantial as to affect or give the appearance of affecting the integrity of the services which the Government may expect of the employee. Whenever disqualification is employed to resolve an apparent or actual conflict of interest, the disqualified employee shall sign a written statement reflecting the scope of the disqualification and the precise nature of the conflicting interest or activity. The reviewing official shall keep a file of all such disqualification statements and shall monitor compliance with these statements on a regular basis.

(b) *Change of assignment* is an appropriate method for resolving apparent or actual conflicts of interest when the interest giving rise to the problem bears a direct or indirect relationship to particular, identifiable duties of the employee involved, and those duties constitute a significant portion of the employee's position.

(c) *Waiver* under 18 U.S.C. 208(b) is an appropriate method for resolving apparent or actual conflicts of interest when:

(1) The employee seeking the waiver reported the financial interest that bears some relationship to his or her official duties, and the reviewing official, in consultation with a deputy ethics counselor or the Department Ethics Counselor, determines that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee; or

(2) By general rule or regulation published in the FEDERAL REGISTER, the Department has exempted the financial interest from the requirements of 18 U.S.C. 208 and this Part as being too remote or too inconsequential to affect the integrity of the Government officers' service.

(d) A *trust* containing a financial interest which may give rise to an apparent or actual conflict of interest is an appropriate method of resolving such conflicts when:

(1) The trust is qualified under Sec. 202(f) of the Ethics in Government Act of 1978 (Pub. L. 95-521), as amended, and subject to the regulations of the Office of Government Ethics; or

(2) In the opinion of the Department's Ethics Counselor, it is sufficiently independent of the employee involved so that the integrity of the employee's services to the Government are not compromised.

(e) *Divestiture* is an appropriate method for resolving actual conflicts of interest when the nature of the financial interest is such that the conflict of interest cannot be adequately resolved by any of the methods set forth in paragraphs (a), (b), (c), and (d) of this section.

(f) *Terminating* an appointment as a method for resolving an actual conflict of interest should be used only when it is clear that no other remedy can be found which would be acceptable to both the Department and the employee. Generally, this method will be employed only in the most extreme cases. Such a termination would be subject to adverse action.

Subpart J—Provisions Relating to Experts, Consultants and Advisory Committee Members

§ 73.735-1001 Coverage.

(a) For purposes of this subpart the title "consultant" will be used to include those who are appointed to serve as experts, consultants or members of advisory committees. All persons who serve as an employee of the Government in the capacity of a consultant are covered by the provisions of this subpart irrespective of:

(1) The title by which designated;

(2) The statutory authority under which services are obtained;

(3) The duration of the period for which services are obtained;

(4) Whether services are obtained by appointment or invitation and acceptance;

(5) Whether services are compensated or rendered without compensation;

(6) Whether or not services are obtained pursuant to a statute excepting employees or special Government employees from conflict of interest statutes.

(b) When the service is for less than 130 days in a service year, experts, consultants, and advisory committee members are included in the group of employees designated by law (18 U.S.C. 202) as "Special Government employees."

§ 73.735-1002 Ethical standards of conduct.

(a) Like other Federal employees, an individual serving in a consultant capacity must conduct himself or herself according to ethical behavior standards of the highest order. In particular, such an individual must:

(1) Refrain from any use of office which is, or appears to be, motivated by a private gain for himself or herself or other persons, particularly those with whom he or she has family, business, or financial ties. The fact that desired gain, if it materializes, will not take place at the expense of the Government makes his or her actions no less improper.

(2) Conduct himself or herself in a manner devoid of any suggestion that he or she is exploiting Government employment for private advantage. A consultant must not, on the basis of any inside information, enter into any speculation or recommend speculation to members of his or her family or business associates, in commodities, land, or the securities of any private company. This injunction applies even though the consultant's duties have no connection whatever with the Government programs or activities which may affect the value of such commodities, land, or securities. He or she should be careful in all personal financial activities to avoid any appearance of acting on the basis of information obtained in the course of his or her Government work.

(3) Refrain from using information not generally available to those outside the Government for the special benefit of a business or other entity by which the consultant is employed or retained or in which he or she has a financial interest. Information not available to private industry should remain confidential in the consultant's hands and not be divulged to his or her private employer or clients. In cases of doubt whether information is generally available to the public, the consultant should confer with the person for whom he or she provides services, with the office having functional responsibility for a specific type of information, or, as appropriate, with the officials designated in § 73.735-202 to give interpretive and advisory service.

(4) Where requested by a private enterprise to act for it in a consultant or advisory capacity and the request appears motivated by the desire for inside information, make a choice between acceptance of the tendered private employment and continuation of his or her Government consultancy. He or she may not engage in both.

(5) Not use his or her position in any way to coerce, or give the appearance of coercing, anyone to provide a finan-

cial benefit to him or her or another person, particularly one with whom the consultant has family, business, or financial ties.

(6) Not receive or solicit anything of value as a gift, gratuity, loan, entertainment, or favor for himself or herself or another person, particularly one with whom he or she has family, business, or financial ties if the acceptance would result in loss of complete independence or impartiality in serving the Government. All consultants are subject to the restrictions in § 73.735-506 of this Part concerning gifts and decorations from foreign governments.

(b) Consultants may engage in other employment so long as there is no real or apparent conflict between the consultant's private employment and his or her official duties. See § 73.735 Subpart G. The regular employment of a consultant who is a special Government employee is not considered outside work for purposes of Subpart G. Also, the limitation in § 73.735-701(f) regarding the amount of an honorarium that may be received does not apply to special Government employees.

(c) A consultant who has questions about conflicts of interest or the application of the regulations in this Part to him or her or to his or her assigned work should make inquiry of the person for whom services are provided. That person may direct the consultant to the Department Ethics Counselor or a deputy ethics counselor for interpretative and advisory services as provided in § 73.735-202.

§ 73.735-1003 Conflicts of interest statutes.

(a) Each consultant should acquaint himself or herself with sections 203, 205, 207 and 208 of title 18, United States Code, all of which carry criminal penalties related to conflicts of interest. The restraints imposed by the four criminal sections are summarized in paragraphs (b) and (c) of this section.

(b) 18 U.S.C. 203 and 205.

(1) These two sections in general operate to preclude a person who works for the Government, except in the discharge of his or her official duties, from representing anyone else before a court or Government agency in a matter in which the United States is a party or has a direct and substantial interest. The prohibition applies whether or not compensation is received for the representation. However, if the individual is a special Government employee, this restriction applies only if:

(i) The representation involves a matter in which the individual has at any time participated personally and substantially in the course of his or her Government employment; or

(ii) The individual has served the Department for more than 60 days in the immediately preceding period of 365 days, and the matter is one which is pending before the Department. This second restraint applies whether or not the matter is one in which the individual participated personally and substantially in his or her Government employment. These two provisions apply to a special Government employee on days when he or she does not serve the Government as well as on the days when services are rendered, and they apply to both paid and unpaid representation.

(2) To a considerable extent the prohibitions of sections 203 and 205 are aimed at the sale of influence to gain special favors for private businesses and other organizations and at the misuse of governmental position or information. In accordance with these aims, a consultant, even when not compelled to do so by sections 203 and 205, should make every effort in his or her private work to avoid any personal contact with respect to negotiations for contracts or grants with the component of the department in which he or she is serving, if the subject matter is related to the subject matter of his or her consultancy or other service. This will not always be possible to achieve where, for example, a consultant has an executive position with his or her regular employer which requires him or her to participate personally in contract negotiations with the department or agency he or she is advising. Whenever this is the case, the consultant should participate in the negotiations for his or her employer only after advising the responsible

Government official of his or her involvement in other matters in the Department. In other instances an occasional consultant may have technical knowledge which is indispensable to his or her regular employer in his efforts to formulate a research and development contract or a research grant, and for the same reason, it is in the interest of the Government that the consultant should take part in negotiations for his or her private employer. Again, the individual should participate only after advising the responsible Government official of the relevant facts.

(3) Section 205 permits both the Government and the private employer of a special Government employee to benefit, in certain cases, from his or her performance of work under a grant or contract for which he or she would otherwise be disqualified because of having participated in the matter for the Government or because it is pending in a component in which the consultant had served more than 60 days in the past year. This provision gives the head of a department the authority, notwithstanding any prohibition in either section 203 or 205, to allow a special Governement employee to represent before such department or agency either his or her regular employer or another person or organization in the performance of work under a grant or contract. As a basis for this action, the Secretary must first makes a certification in writing, published in the FEDERAL REGISTER, that it is required by the national interest.

(4) Section 205 contains two other exemptive provisions, which apply to both special and regular Government employees. See § 73.735-702.

(c) 18 U.S.C. 207 applies to individuals who have left Government service. See Subpart N of these regulations.

(d) 18 U.S.C. 208 bears on the activities of Government personnel, including special Government employees, in the course of their official duties. In general, it prevents a Government employee from participating as such in a particular matter in which, to his or her knowledge, he or she, his or her spouse, minor child, partner, or a profit or non-profit enterprise with which he or she is connected has a financial interest. However, the section permits an employee's agency to grant him or her an ad hoc exemption if the interest is not so substantial as to affect the integrity of his or her services. Insignificant interests may also be waived by a general rule or regulation. The matters in which special Government employees are disqualified by section 208 are not limited to those involving a specific party or parties in which the United States is a party or has an interest, as in the case of sections 203, 205 and 207. Section 208 therefore extends to matters in addition to contracts, grants, judicial and quasi-judicial proceedings, and other matters of an adversary nature. Accordingly, a special Government employee, like all government employees, should in general be disqualified from participating as such in a matter of any type the outcome of which will have a direct and predictable effect upon the financial interests covered by the section.

However, the power of exemption may be exercised in this situation if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization. The power of exemption may also be exercised where the financial interests involved are minimal in value.

§ 73.735-1004 Requesting waivers or exemptions.

(a) A consultant may present in writing to the official for whom he or she provides services requests for the waivers or exemptions specified in § 73.735-1003. That official will take, or refer the request for, action as appropriate, and will see that the employee receives advice or decision on his or her request.

(b) A file of all waivers or exemptions granted shall be maintained in such manner that information can be given promptly on individual cases or statistics provided upon request. Generally, these records, together with written advice given in connection with less formal requests concerning questions of ethical standards, are kept with the employee's statement of employment and financial interests or financial disclosure report (§ 73.735-1006).

§ 73.735-1005 Salary from two sources.

Special government employees are not subject to 18 U.S.C. 209 which prohibits other employees from receiving any salary, or supplementation of Government salary, from a private source as a compensation for services to the Government. This Department will not knowingly pay per diem to a consultant who also receives per diem pay for the same day from another Government agency (in or outside the Department). Erroneous payments in contravention of this provision will be subject to collection, and any consultant who willfully collects double payments may be barred from further employment.

§ 73.735-1006 Reporting financial interests.

(a) Consultants who will work more than 60 days in a calendar year are subject to the provisions of title II of the Ethics in Government Act of 1978 when their rate of pay is equal to or greater than the basic rate for GS-16, Step 1. Such consultants are covered by the reporting requirements of § 73.735-901 of these regulations.

(b) Consultants not subject to the Ethics in Government Act shall file statements of financial interests as provided by § 73.735-902 of these regulations.

§ 73.735-1007 Political activity.

Consultants who serve intermittently are subject to the political activity restrictions of subchapter III of Chapter 73 of title 5 U.S.C. and Civil Service Rule IV only on days on which service is rendered and then for the entire 24 hours of such service day. Other consultants are subject to these restrictions at all times.

Subpart K—Special Government Employees Other Than Consultants

§ 73.735-1101 General provision.

Individuals who are designated as special Government employees because of the nature of their services but who are not serving as a consultant, expert, or advisory committee member are subject to the provisions of Subparts B through I of these regulations. However, the provisions of 18 U.S.C. 205, 206, 207, and 208 apply to them only as described in Subpart J. Also, the limitation in § 73.735-701(f) on the amount of an honorarium that may be received does not apply.

Subpart L—Disciplinary Action

§ 73.735-1201 General provisions.

(a) Violation of the regulations contained in this Part may be cause for disciplinary action which could be in addition to any penalty prescribed by law.

(b) The type of disciplinary action to be taken must be determined in relation to the specific violation. Those responsible for recommending and for taking disciplinary action must apply judgment to each case, taking into account the general objectives of meeting any requirements of law, deterring similar offenses by the employee and other employees, and maintaining high standards of employee conduct and public confidence. Some types of disciplinary action which may be considered are:

(1) Admonishment
(2) Written reprimand
(3) Reassignment
(4) Suspension
(5) Demotion
(6) Removal

(c) Suspension, demotion, and removal are adverse actions; and when such actions are taken, applicable laws, regulations, and policies must be followed.

Subpart M—Reporting Violations

§ 73.735-1301 Responsibility for reporting possible criminal violations.

An employee who has information which he or she reasonably believes indicates a possible offense against the United States by an employee of the Department, or any other individual working on behalf of the Department, shall immediately report such information to his or her supervisor, any management official, or directly to the Office of the Inspector General. Offenses covered by the preceding sentence include, but are not limited to, bribery, fraud, perjury, conflict of interest, misuse of funds, equipment, or facilities, and other conduct by a government officer or employee, grantee, contractor or other person which is prohibited by title 18 of the United States Code. Employees and supervisors should refer to chapter 5-10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information.

§ 73.735-1302 Responsibility for reporting allegations of misconduct.

An employee who has information which he or she reasonably believes indicates the existence of an activity constituting (a) a possible violation of a rule or regulation of the Department; or (b) mismanagement, a gross waste of funds, or abuse of authority; or (c) a substantial and specific danger to the public health and safety, shall immediately report such information to his or her supervisor, any management official of the Department, or directly to the Office of the Inspector General. Employees and supervisors should refer to chapter 5-10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information. This subsection does not cover employee grievances, equal employment opportunity complaints, classification appeals, or other matters for which a formal government-wide review system has been established by the Federal government.

§ 73.735-1303 Prohibition of reprisals.

(a) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or providing any information pursuant to § 73.735-1301 and 1302. If the complaint was made or the information was disclosed with the knowledge that it was false, or with willful disregard of its truth or falsity, any personnel action taken against the employee based on those reasons would not constitute a reprisal action.

(b) An employee who believes that he or she has been threatened with a personnel action, any other action, or harassment or has been harmed by any action as a reprisal for having made a complaint or providing information pursuant to § 73.735-1301 or 1302 may request the Office of the Inspector General to review his or her allegations. Whenever the Inspector General has reason to believe that the allegations may be true, he or she will refer the matter to the Assistant Secretary for Personnel Administration for appropriate action. The Assistant Secretary for Personnel Administration may order a stay of any personnel action if he or she determines that there are reasonable grounds to believe that the personnel action is being taken as a reprisal for making a complaint or providing information pursuant to § 73.735-1301 or 1302.

§ 73.735-1304 Referral of matters arising under the standards of this part.

(a) The Department Ethics Counselor may refer to the Inspector General for investigation and/or further action any matter arising under the standards of this Part.

(b) The Department Ethics Counselor may refer to the Office of Government Ethics, or the Inspector General may refer to the Department of Justice, suspected violations of the criminal laws regarding employee standards of conduct and conflicts of interest.

Subpart N—Conduct and Responsibilities of Former Employees

§ 73.735-1401 Prohibitions against post-employment conflicts of interest.

(a) The purpose of criminal prohibition in 18 U.S.C. 207 is to prevent the unfair use of inside knowledge or influence that results from Federal service. 18 U.S.C. 207 generally prohibits a former employee from acting as another person's representative to the Government in particular matters involving a specific party or parties in which the employee had been involved while in Federal service. This prohibition does not require a former employee to decline employment with any organization regardless of his or her dealings with that organization while employed by the Government. It applies solely to activities, not the mere existence of an employment arrangement.

(b) The Office of Government Ethics, Office of Personnel Management, has issued Government-wide regulations covering post-employment conflict of interest (5 CFR Part 737). Those regulations are incorporated herein by reference, and they are available for review in personnel offices throughout the Department.

PART 73a—STANDARDS OF CONDUCT: FOOD AND DRUG ADMINISTRATION SUPPLEMENT

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Subparts F—I—[Reserved]

Subpart J—Statements of Employment and Financial Interests

Sec.
73a.735-1004 Submission and review of statements.

AUTHORITY: Part 73a is issued under 45 CFR 73.735-105.

SOURCE: 43 FR 7619, Feb. 24, 1978, unless otherwise noted.

Subpart A—General Provisions

§ 73a.735-101 Principles and Purpose.

(a) To assure that the business of the Food and Drug Administration (FDA) is conducted effectively, objectively, and without improper influence or appearance thereof, all employees must be persons of integrity and observe the highest standards of conduct. Because of FDA's special regulatory responsibilities to the consumer and industry, its employees must be especially alert to avoid any real or appearance of conflict of their private interests with their public duties. Their actions must be unquestionable and free from suspicion of partiality, favoritism, or any hint of conflicting interests. This supplement recognizes FDA's public obligation to set reasonable and fair safeguards for the prevention of employee conflicts of interest. It is necessary to meet FDA's regulatory responsibilities and to otherwise assure full protection of the public confidence in the integrity of its employees.

(b) Since FDA is a unique consumer protection and regulatory agency within the Department, the DHHS Standards of Conduct need further supplementation to reflect this role. Therefore, for purposes of implementing the DHHS Standards of Conduct regulations within the FDA, this supplement provides interpretive definitions and additional requirements. As further guidance to its employees and supervisory officials, FDA will issue internal procedural instructions in accordance with this supplement.

§ 73a.735-103 Responsibilities.

(a) A "control activity" employee shall be personally responsible for assuring that he does not hold an interest in any organization whose FDA-regulated activities constitute more than an insignificant part of its business as defined in § 73a.735-502(b)(2). The Associate Commissioner for Administration (or his designee) is available to assist such employees in obtaining corporate data necessary to make such a determination.

(b) Other employees are similarly responsible for observing the financial interest retention requirements in §§ 73a.735-501(b) and 73a.735-502(a)(2).

§ 73a.735-104 Advice and guidance.

(a) The Associate Commissioner for Administration (or his designee) shall provide day-to-day guidance and assistance to employees and supervisors on matters covered by regulations in Part 73 and this part of this chapter.

(b) The FDA Conflict of Interest Review Board shall review and make recommendations to the Commissioner on requests for exceptions to conflict of interest policies and procedures in regulations in this part and Part 73 of this chapter.

Subpart B—Miscellaneous Provisions

§ 73a.735-201 Control activity employees formerly associated with organizations subject to FDA regulation.

(a) For a period of 1 year after FDA appointment, or appointment to the Food and Drug Division, Office of the General Counsel, a control activity employee who was employed in a regulated organization within 1 year before FDA employment shall not participate in any regulatory action before FDA that involves the former employer organization. Exceptions may be authorized only under paragraph (e) of this section.

(b) A control activity employee who was previously employed in a regulated organization shall not participate in any regulatory action before FDA in which the employee had participated personally and substantially in behalf of the former employer organization, e.g., drug investigations/applications, food additive petitions, matters dealing with compliance in areas of radiation-producing products or medical devices. Exceptions may be authorized only under paragraph (e) of this section.

(c) Employment in a regulated organization includes contractual relationships, e.g., attorneys who may have represented an FDA-regulated firm or industry or an association of such firms and individuals who may have served a firm, industry or association in a consultant capacity.

(d) Within 30 days after assignment to a control activity position, an employee shall submit to his supervisor detailed information concerning former industry employers, and dates and substance of involvement in such regulatory matters as may be subject to the prohibition in paragraph (b) of this action.

(e) The Commissioner may grant individual exceptions to paragraphs (a) and (b) of this section whenever he determines that strict application would not be in the best interests of the United States. A memorandum of any exception granted shall be filed for public inspection in the Public Records and Documents Center, Food and Drug Administration, Room 4-68, 5600 Fishers Lane, Rockville, Md. 20857, within 10 days after the Commissioner's decision. The memorandum shall include the employee's name, title, grade, summary of official duties, prior pertinent industry involvement, a brief description of the specific regulatory action in which the employee has been permitted to participate, and a statement explaining why such strict application of the subpart would not be in the best interests of the United States.

Subpart C—[Reserved]

Subpart D—Outside Employment

§ 73a.735-401 General provisions.

(a) Employees of the Food and Drug Administration shall obtain advance approval for all outside employment, whether paid or unpaid. Employment, as used in this section, does not include:

(1) Memberships in charitable, religious, social, fraternal, recreational, public service, civic, or similar nonbusiness organizations.

(2) Memberships in professional organizations. (Officeholding, however, requires advance approval.)

(3) Performance of duties in the Armed Forces Reserve or National Guard.

(b) Control activity employees (defined in § 73a.735-502) will not generally be granted approval to:

(1) Manage or direct an organization whose activities are subject to FDA regulation, or

(2) Be employed in an organization whose business activities are subject to FDA regulation unless:

(i) The regulated activities of the organization are an insignificant part of its total operations, i.e., the regulated products of the organization constitute no more than 10 percent of its annual gross sales, and

(ii) The outside employment is in nonregulated activities of the organization.

(c) All other employees will generally be granted approval to engage in outside employment which is compatible with the full performance of their FDA duties and responsibilities and which will not give rise to a real or apparent conflict of interest. Permissible employment includes but is not limited to:

(1) Employment where the sale of FDA-regulated products is incidential to the purpose of the establishment, e.g., hotels, theaters, bowling alleys, and sports arenas.

(2) Sales and clerical occupations relating to regulated products, e.g., supermarkets, drugstores, department stores, liquor stores.

(3) Trade, industrial, and service occupations relating to regulated products, e.g., gasoline service station attendant, line production or assembly work, cook, waiter, waitress, hospital attendant, snack bar vendor, warehouseman.

(d) All employees will generally be granted approval to engage in paid or unpaid outside employment which contributes to their technical or professional development, e.g.,

(1) Medical, dental, and veterinary practices.

(2) Pharmacy practice after meeting the following conditions which will serve to protect against possible conflicts or apparent conflicts of interest and to avoid other problems resulting in embarrassment to the employee or FDA:

(i) The primary purpose of the part-time employment is to contribute to the overall professional development of the employee and generally enhance his capability to better perform his current FDA duties.

(ii) The part-time duties will be confined generally to dispensing Rx drugs and related professional pharmacy duties.

(iii) The employee will avoid unrelated nonprofessional duties such as supervision or management of store operations, contractual or purchasing responsibilities (except normal "out-of-stock" requisitioning) and repacking and relabeling of bulk items.

(iv) The employee will demonstrate a high degree of discretion and judgment in his contacts with customers and representatives of regulated industry and competitor firms so as to avoid giving the impression that:

(*a*) His part-time actions, recommendations, opinions, or remarks are official points of view;

(*b*) He is using his FDA position for private gain by oral misrepresentations and false claims of the company's products;

(*c*) He is making a Government decision outside official channels, e.g., to customers, prescribing physicians, buyers, distributors;

(*d*) He or other FDA representatives will give preferential treatment to any regulated organization or representatives of such organizations, or that FDA employees have not exercised complete independence or impartiality in carrying out their regulatory and consumer protection responsibilities; or

(*e*) His part-time work is creating an adverse effect on the image of FDA or discrediting the integrity of official FDA regulatory decisions.

Subpart E—Financial Interests

§ 73a.735-501 General provisions.

(a) No restrictions are placed on ownership of diversified mutual funds.

(b) An FDA employee, other than a control activity employee (defined in § 73a.735-502), may have financial interests:

(1) In an organization whose FDA-regulated activities are an insignificant part of its total operations, i.e., no more than 10 percent of the organization's annual gross sales are in products regulated by FDA; or

(2) In an organization whose FDA-regulated business activities are a significant part of its total business operations: *Provided*, That:

(i) The holding is less than $5,000 (value or cost at time of initial reporting),

(ii) The holding represents less than 1 percent of the total outstanding stock shares of that organization, and

(iii) No more than 50 percent of the employee's total investment value is concentrated in organizations whose FDA-regulated business activities are a significant part of their business operations.

(c) Notwithstanding the provisions of this part permitting employees to hold financial interests in organizations subject to FDA regulation, an employee holding such an interest shall not participate in an official matter whose outcome would have a direct and predictable effect on his financial interest. However, this prohibition is not applicable to:

(1) Diversified mutual funds, which are exempted from 18 U.S.C. 208 by § 73.735-501(a) of this chapter.

(2) Financial interests for which the Commissioner has in advance granted a written exception on the ground that the public interest would be served if a particular employee is allowed to participate in an official matter whose outcome may have a direct and predictable effect on the employee's financial interest. Such exemptions will be granted only in exceptional circumstances. Any determination to authorize such exceptions shall be made in accordance with 18 U.S.C. 208(b)(1) and documented for public inspection in accordance with § 73a.735-504.

§ 73a.735-502 Employees in regulatory activities.

(a) An employee in regulatory activities ("control activity" employee) may hold financial interests in an FDA-regulated organization only if either of the following conditions are met:

(1) The regulated activities of the organization are an "insignificant" part of its total business operations, or

(2) Written approval for an individual exception is granted by the Commissioner in accordance with § 73a.735-504; however, such approval will not be considered unless all of the following conditions are met:

(i) Retention of the financial interest does not give rise to an actual conflict of interest;

(ii) Acquisition of the financial interest occurred by marriage or inheritance, or the interest was held prior to an FDA reorganization, change in regulations, or similar circumstances beyond the control of the employee that resulted in the interest becoming prohibited;

(iii) No direct relationship exists between the employee's official duties and the regulated activities of the organization in which the financial interest is held;

(iv) The employee occupies a position below that of Bureau/Deputy Bureau Director (or Assistant/Deputy General Counsel, Food and Drug Division, Office of the General Counsel); and

(v) The employee agrees to refrain from engaging, either directly or indirectly, in transactions that are designed to increase the value of his "excepted" financial interest.

(b) To administer provisions within this Part, the following interpretations apply:

(1) A "control activity" employee ("control activity" positions are identified in Appendix C to Part 73 of this chapter), means one who:

(i) Occupies an FDA position classified at GS-11 or above, or PHS Commissioned Officer 0-3 or above, or equivalent;

(ii) Occupies an FDA position below GS-11 with duties of a nature that the employee could in the discharge of his official duties and responsibilities cause an economic advantage for or impose a handicap on a non-Federal enterprise (includes investigators, inspectors, regulatory analysts);

(iii) Occupies a position at GS-11 or above in the Office of the Assistant General Counsel, Food and Drug Division.

(2) "Insignificant" (part of an organization's total business operations) means that the FDA-regulated products constitute no more than 10 percent of the organization's annual gross sales.

§ 73a.735-504 Exceptions.

(a) A control activity employee who can satisfy all of the conditions specified in § 73a.735-502(a)(2) may submit a request to retain a prohibited financial interest. Any such request must be submitted no later than 30 days after the event that results in the employee holding the prohibited financial interest. Such requests for exception should be forwarded in writing through supervisory channels to the Associate Commissioner for Administration for review by the FDA Conflict of Interest Review Board and subsequent recommendation to the Commissioner. All decisions on requests for exceptions shall be in writing and a copy furnished to the employee involved.

(b) A memorandum of each approved exception shall be filed in the Public Records and Documents Center for public inspection. Such public disclosure shall be made within 10 days after the Commissioner's decision. The following is an example of the format of such memorandum (in a hypothetical employee situation):

(1) Employee: Joe Doe.

(2) Title: Research Chemist.

(3) Grade/Salary: GS-14.

(4) Organization: Bureau of Biologics, Food and Drug Administration, Bethesda, Md.

(5) Date of employee's request for exception: ——.

(6) Date of Commissioner's approval: ——.

(7) Basis for exception: Employee owns financial interest in the ABC Foods Corporation, and permanent retention is normally prohibited under FDA/HHS conflict of interest regulations for such an employee. The employee, however, acquired this financial interest prior to his reassignment to FDA on ——, which was part of a major Department reorganization transferring certain functions from NIH to the FDA (i.e., FDA's Bureau of Biologics). At the time of acquisition and immediately prior to the reorganization, the employee's financial interest was allowable under Department regulations. The employee's official duties are fully confined to the matters under the jurisdiction of the Bureau of Biologics, and his official duties do not involve any contact with the food industry. The Commissioner has determined that an exception is warranted under the following criteria:

(i) Acquisition occurred prior to Department reorganization;

(ii) Financial interest retention will not give rise to an actual conflict of interest situation;

(iii) There is no direct relationship between the employee's official duties and the regulated activities of ABC Foods;

(iv) The employee occupies a position below that of Bureau or Deputy Bureau Director (or equivalent position in the Office of the Commissioner); and

(v) The employee agrees to refrain from engaging in any direct or indirect transactions that are designed to increase the value/shares of the "excepted" ABC Foods interests.

This exception is considered equitable to the employee involved, and retention of the ABC Foods interest will not in any way impair the interests of the Government or of the public.

(c) In interpreting the requirement of § 73a.735-502(a)(2)(v), events not involving employee discretion (e.g., accepting dividends in the form of cash or additional shares) do not constitute transactions designed to increase the value/shares of an "excepted" financial interest. A transaction involving discretion, e.g., exercise of stock options, may be made only if proposed to the Associate Commissioner for Administration and approved by the Conflict of Interest Review Board as an amendment to the original exception. A memorandum recording such approval shall be made public in accordance with paragraph (b) of this section.

(d) An employee may temporarily retain a prohibited financial interest pending review of a written request for an exception submitted in accordance with this section.

(e) Except as provided in § 73a.735-501(c), no employee may participate in an official matter whose outcome will have a direct and predictable effect on a financial interest held by him. This prohibition applies to official matters handled before and after approval of an exception under this section.

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§ 73a.735-1004 Submission and review of statements.

(a) Employees occupying control activity positions shall file Form HHS-473 "Confidential Statement of Employment and Financial Interests" with the Associate Commissioner for Administration within 30 days after entrance in this category and annually thereafter as of June 30, or such other dates as the Secretary, with the concurrence of the Civil Service Commission, may approve. Prior to the due date, the Associate Commissioner for Administration shall advise "control activity" employees of the annual filing requirement through normal administrative channels. The annual reporting requirement shall commence as of June 30, 1977.

(b) The Associate Commissioner for Administration (or his designee) shall serve as the principal reviewing official for Outside Activity Forms, HHS-520 and 521, and shall make final determinations on matters arising from activities reported on Form HHS-473.

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AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 22576, April 3, 1980, unless otherwise noted.

Subpart A—General

§ 74.1 Purpose and scope of this part.

This part establishes uniform requirements for the administration of HHS grants and principles for determining costs applicable to activities assisted by HHS grants.

§ 74.2 Scope of subpart.

This subpart contains general rules pertaining to this Part 74 (definitions, purpose and scope, applicability, and appeals) and procedures for control of deviations from the part.

§ 74.3 Definitions.

As used in this part:

"Awarding party" means (1) with respect to a grant, the granting agency, and (2) with respect to a subgrant, the grantee. (See § 74.4(b))

"Contract" means (except as used in the definitions for "grant" and "subgrant" in this section and except where qualified by "Federal") a procurement contract under a grant or subgrant, and "subcontract" means a procurement subcontract under such a contract.

"Cost-type contract" means a contract or subcontract in which the contractor or subcontractor is paid on the basis of the costs it incurs, but the term does not include such subcontracts under a non-cost-type contract or subcontract.

"Expenditure report" means: (1) For nonconstruction grants, the "Financial Status Report" (or other equivalent report); (2) for construction grants, the "Outlay Report and Request for Reimbursement for Construction Programs" (or other equivalent report). (See subpart I of this part.)

"Federally recognized Indian tribal government" means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs. However, for policies applicable to tribal government hospitals and institutions of higher education, see § 74.4(c), "Applicability of this part."

"Government" means a State or local government or a Federally recognized Indian tribal government. However, for policies applicable to government hospitals and institutions of higher education, see § 74.4(c), "Applicability of this part."

"Grant" means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government to an eligible recipient. The term includes such financial assistance when provided by contract, but does not include any Federal procurements subject to the procurement regulations in 41 CFR, nor does it include technical assistance, which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the recipient is not required to account for on an actual cost basis.

"Grantee" means the government, nonprofit corporation, or other legal entity to which a grant is awarded and which is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the award document. For example, a grant award document may name as the grantee an agency of a State, or one school or campus of a university. In these cases, the granting agency usually intends, or actually requires, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provisions of grant programs in which eligibility is limited to organizations, such as State welfare departments, which may be only components of a legal entity.) The term "grantee" does not include any secondary recipients such as subgrantees, contractors, etc., who may receive funds from a grantee pursuant to a grant.

"Granting agency" means any organizational component of HHS authorized to award and administer grants.

"HHS" means the U.S. Department of Health and Human Services.

"Local government" means a local unit of government including specifically a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), "sponsor or sponsoring local organization" of a watershed project (as defined in 7 CFR 620.2, 40 FR 12472, March 19, 1975), any other regional or interestate government entity, or any agency or instrumentality of a local government. However, for policies applicable to government hospitals and institutions of higher education, see § 74.4(c), "Applicability of this part."

"OGP" means the Office of Grants and Procurement, which is an organizational component within the Office of the Secretary, HHS, and reports to the Assistant Secretary for Management and Budget.

"OMB" means the Office of Management and Budget within the Executive Office of the President.

"Recipient" means grantee or subgrantee. (See § 74.4(b).)

"State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. However, for policies applicable to government hospitals and institutions of higher education, see § 74.4(c), "Applicability of this part."

"Subgrant" means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contract, but does not include procurements; nor does it include any form of assistance which is excluded from the definition of "grant" in this section.

"Subgrantee" means the government, nonprofit corporation, or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided. The subgrantee is the entire legal entity even if only a particular component of the entity is designated in the subgrant award document.

"Terms of a grant or subgrant" means all requirements of the grant or subgrant, whether in statute, regulations, the award document or elsewhere.

§ 74.4 Applicability of this part.

(a) *General.* Except where inconsistent with Federal statutes, regulations, or other terms of a grant, this part applies to all HHS grants, other than the block grant programs identified in 45 CFR 96.1. However, unless expressly made applicable by the granting agency, this part shall not apply when the grantee is a Federal agency, foreign government or organization, international organization such as the United Nations, for-profit organization, or individual.

(b) *Subgrants.* For each substantive provision in this part, either the language of the provision itself or other text in the same subpart will indicate whether the provision affects only grants, only subgrants, or both. Use of the term "recipient" (as defined in § 74.3) in a provision shall be taken as referring equally to grantees and subgrantees. Similarly, use of the term "awarding party" (as defined in § 74.3) shall be taken as referring equally to granting agencies and to grantees awarding subgrants. However, unless expressly made applicable by the granting agency, this part need not be applied by the grantee to a subgrant if the subgrantee is a Federal agency, foreign government or organization, international organization such as the United Nations, for-profit organization, or individual.

(c) *Public institutions of higher education and hospitals.* Grants and subgrants to institutions of higher education and hospitals operated by a government shall be subject only to provisions of this subpart that apply to nongovernmental organizations.

[45 FR 22576, Apr. 3, 1980, as amended at 46 FR 48592, Oct. 1, 1981]

§ 74.5 Appeals.

In accordance with parts 16 and 75 of this title, grantees may appeal certain postaward administrative decisions made by HHS officials.

§ 74.6 Deviations.

(a) Except as provided in § 74.7, a deviation is any exception to this part not required by Federal statute without allowance of agency discretion. A deviation may be either:

(1) Use of any policy, procedure, form, standard, or grant or subgrant term which is inconsistent with an applicable provision of this part, or

(2) Failure to use any applicable policy, procedure, form, standard, or grant or subgrant term which is required by this part.

(b) In order to maintain uniformity to the greatest extent feasible, deviations shall be kept to a minimum. A deviation, whether proposed by an applicant, a recipient, or an official of the granting agency, may be authorized only when it is necessary to meet programmatic objectives, or to conserve grant funds, or when it is otherwise essential in the public interest.

(c) Except as provided in paragraph (d) of this section, a deviation from this part may be made only when authorized by both:

(1) The head of the granting agency or other officials if designated in or pursuant to formal deviation control procedures established by the agency, and

(2) OGP.

(d) Deviations from subpart Q of this part and appendixes C, D, E, and F to this part in individual cases (i.e., where only a single grant or subgrant is involved) shall not require OGP approval.

§ 74.7 Special grant or subgrant conditions.

(a) Without regard to the deviation control procedures of § 74.6, special grant conditions more restrictive than those prescribed in this part 74 may be imposed as needed when the granting agency has determined that the grantee:

(1) Is financially unstable,

(2) Has a history of poor performance, or

(3) Has a management system which does not meet the standards of this part.

(b) When special conditions are imposed under paragraph (a) of this section, the grantee will be notified in writing:

(1) Why the special conditions were imposed and

(2) What corrective action is needed.

Furthermore, in accordance with OMB Circulars A-102 and A-110, OMB and other Federal agencies in a granting relationship with the grantee will be provided copies of the notice to the grantee.

(c) Grantees may apply the provisions of paragraphs (a) and (b) of this section to their subgrantees. Whenever they do so, a copy of the notice to the subgrantee shall be furnished to the granting agency.

Subpart B—Cash Depositories

§ 74.10 Physical segregation and eligibility.

Except as provided in § 74.11, awarding parties shall not impose grant or subgrant terms which:

(a) Require the recipient to use a separate bank account for the deposit of grant or subgrant funds, or

(b) Establish any eligibility requirements for banks or other financial institutions in which recipients deposit grant or subgrant funds.

§ 74.11 Checks-paid basis letter of credit.

A separate bank account shall be used when payments under letter of credit are made on a "checks-paid" basis. A checks-paid basis letter of credit is one under which funds are not drawn until the recipient's checks have been presented to its bank for payment. (See Subpart K for definition of "letter of credit.")

§ 74.12 Minority-owned banks.

Consistent with the national goal of expanding opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority-owned banks. Upon request, OGP will furnish a list of minority-owned banks.

Subpart C—Bonding and Insurance

§ 74.15 General.

In administering grants and subgrants, recipients shall observe their regular requirements and practices with respect to bonding and insurance. No additional bonding and insurance requirements, including fidelity bonds, shall be imposed by the terms of the grant or subgrant except as provided in §§ 74.16 through 74.18.

§ 74.16 Construction and facility improvement.

(a) *Scope of this section.* This section covers requirements for bid guarantees, performance bonds, and payments bonds when the recipient will contract for construction or facility improvement (including alterations and renovations of real property) under a grant or subgrant.

(b) *Definitions.* (1) "Bid guarantee" means a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, if its bid is accepted, execute the required contractual documents within the time specified.

(2) "Performance bond" means a bond executed in connection with a contract to secure fulfillment of all the contractor's obligations under the contract.

(3) "Payment bond" means a bond executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(c) *Bids and contacts of $100,000 or less.* The recipient shall follow its own requirements and practices relating to bid guarantees, performance bonds, and payment bonds.

(d) *Bids and contracts exceeding $100,000.* The recipient may follow its own regular policy and requirements if the HHS granting agency has determined that the Federal Government's interest will be adequately protected.

If this determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to 5 percent of the bid price;

(2) A performance bond on the part of the contractor for 100 percent of the contract price; and

(3) A payment bond on the part of the contractor for 100 percent of the contract price.

§ 74.17 Fidelity bonds.

(a) If the grantee is not a government, the granting agency may require it to carry adequate fidelity bond coverage where the absence of coverage for the grant-supported activity is considered as creating an unacceptable risk.

(b) If the subgrantee is not a government, the granting agency or the grantee may require that it carry adequate fidelity bond coverage where the absence of coverage for the subgrant-supported activity is considered as creating an unacceptable risk.

(c) A fidelity bond is a bond indemnifying the recipient against losses resulting from the fraud or lack of integrity, honesty or fidelity of one or more employees, officers or other persons holding a position of trust.

§ 74.18 Source of bonds.

Any bonds required under §§ 74.16(d)(1) through (3) or 74.17 shall be obtained from companies holding certificates of authority as acceptable sureties (31 CFR Part 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570.

Subpart D—Retention and Access Requirements for Records

§ 74.20 Applicability.

(a) This subpart applies to all financial and programmatic records, supporting documents, statistical records, and other records of recipients, which are:

(1) Required to be maintained by the terms of an HHS grant, or

(2) Otherwise reasonably considered as pertinent to an HHS grant.

(b) This subpart does not apply to the records of contractors and subcontractors under grants and subgrants. For a requirement to place a provision concerning those records in certain kinds of contracts, see Subpart P and Appendices G and H of this part.

[45 FR 37667, June 3, 1980]

§ 74.21 Length of retention period.

(a) Except as provided in paragraphs (b) and (c) of this section, records shall be retained for 3-years from the starting date specified in § 74.22.

(b) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(c) In order to avoid duplicate recordkeeping, awarding parties may make special arrangements with recipients to retain any records which are continuously needed for joint use. The awarding party will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the awarding party the 3-year retention requirement is not applicable to the recipient.

§ 74.22 Starting date of retention period.

(a) *General.* (1) Where HHS grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee submits to HHS its single or last expenditure report for that period. However, if HHS grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits to HHS its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report to HHS. If an expenditure report has been waived, the retention period starts on the day the report would have been due. "Expenditure report" is defined in § 74.3.

(2) Exceptions to this paragraph are contained in paragraphs (b) through (d) of this section.

(b) *Equipment records.* The retention period for the equipment records required by § 74.140(a) starts from the date of the equipment's disposition (§ 74.139) or replacement (§ 74.138) or transfer at the direction of the awarding party (§ 74.136).

(c) *Records for income transactions after grant or subgrant support.* (1) In some cases an HHS requirement concerning the disposition of program income, as defined in subpart F of this part, will be satisfied by applying the income to costs incurred after expiration or termination of grant or subgrant support for the activity giving rise to the income. In such a case, the retention period for the records pertaining to the costs starts from the end of the recipient's fiscal year in which the costs are incurred.

(2) In some cases, there may be an HHS requirement concerning the disposition of copyright royalties or other program income which is earned after expiration or termination of grant or subgrant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the recipient's fiscal year in which the income is earned. (See subpart F of this part.)

(d) *Indirect cost rate proposals, cost allocation plans, etc.*—(1) *Applicability.* This paragraph applies to the following types of documents, and their supporting records:

(i) Indirect cost rate computations or proposals;

(ii) Cost allocation plans under Appendix C to this part;

(iii) Hospital patient care rate computations or proposals; and

(iv) Any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(2) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(3) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

§ 74.23 Substitution of microfilm.

Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

§ 74.24 Access to records.

(a) *Records of grantees.* HHS and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the grantee which are pertinent to the HHS grant, in order to make audit, examination, excerpts, and transcripts.

(b) *Records of subgrantees.* HHS, the Comptroller General of the United States, and the grantee, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the subgrantee which are pertinent to the HHS grant, in order to make audit, examination, excerpts, and transcripts.

(c) [Reserved]

(d) *Expiration of right of access.* The rights of access in this section shall not be limited to the required retention period but shall last as long as the records are retained.

[45 FR 22576, Apr. 3, 1980, as amended at 45 FR 37667, June 3, 1980]

§ 74.25 Restrictions on public access.

Unless required by Federal statutes, awarding parties may not impose grant or subgrant terms which limit public access to records covered by this subpart except after a determination by the granting agency that the records must be kept confidential and would have been excepted from disclosure under HHS's "Freedom of Information" regulation (Part 5 of this title) if the records had belonged to HHS. This section does not require recipients to permit public access to their records.

[45 FR 22576, Apr. 3, 1980, as amended at 45 FR 37667, June 3, 1980]

Subpart E—Waiver of Single State Agency Requirements

§ 74.30 Policy.

Requests to HHS from Governors, or other duly constituted State authorities, for waiver of single State agency requirements in accordance with section 204 of the Intergovernmental Cooperation Act of 1968 will be given expeditious handling. Whenever possible, such requests will be granted.

Subpart F—Grant-Related Income

§ 74.40 Scope of subpart.

This subpart contains policies and requirements relating to (a) program income and (b) interest and other investment income earned on advances of grant funds.

§ 74.41 Meaning of program income.

(a) Except as explained in paragraphs (b) and (c) of this section, program income means gross income earned by a recipient from activities part or all of the cost of which is either borne as a direct cost by a grant or counted as a direct cost towards meeting a cost sharing or matching requirement of a grant. It includes but is not limited to such income in the form of fees for services performed during the grant or subgrant period, proceeds from sale of tangible personal or real property, usage or rental fees, and patent or copyright royalties. If income meets this definition, it shall be considered program income regardless of the method used to calculate the amount paid to the recipient—whether, for example, by a cost-reimbursement method or fixed price arrangement. Nor will the fact that the income is earned by the recipient from a Federal procurement contract or from a procurement contract under a Federal grant awarded to another party affect the income's classification as program income.

(b) For research grants that are subject to an institutional cost-sharing agreement, income shall be considered program income only if it is earned from an activity part or all of the cost of which is borne as a direct cost by the Federal grant funds. An institutional cost-sharing agreement is one entered into between HHS and a grantee covering all of HHS's research project grants to the grantee in the aggregate.

(c) The following shall not be considered program income:

(1) Revenues raised by a government recipient under its governing powers, such as taxes, special assessments, levies, and fines. (However, the receipt and expenditure of such revenues shall be recorded as a part of grant or subgrant project transactions when such revenues are specifically earmarked for the project in accordance with the terms of the grant or subgrant.)

(2) Tuition and related fees received by an institution of higher education for a regularly offered course taught by an employee performing under a grant or subgrant.

(d) For the purposes of this subpart, program income is divided into several categories. Each category is treated in a separate section of this subpart.

§ 74.42 General program income.

(a) *Definition.* General program income means all program income accruing to a grantee during the period of grant support or to a subgrantee during the period of subgrant support, other than the special categories of such income treated in §§ 74.43 through 74.45.

(b) *Use.* (1) General program income shall be retained by the recipient and used in accordance with one or a combination of the alternatives in paragraphs (c), (d), and (e) of this section, as follows: The alternative in paragraph (c) may always be used by recipients and must be used if neither of the other two alternatives is permitted by the terms of the grant. The alternatives in paragraphs (d) or (e) may be used only if expressly permitted by the terms of the grant. In specifying alternatives that may be used, the terms of the grant may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income.

(2) The terms of a subgrant may restrict the use of general program income earned by the subgrantee to only one or some of the alternatives permitted by the terms of the grant, but the alternative in paragraph (c) of this section shall always be permitted.

(c) *Deduction alternative.* (1) Under this alternative, the income is used for allowable costs of the project or program. If there is a cost-sharing or matching requirement, costs borne by the income may not count toward satisfying that requirement. Therefore, the maximum percentage of Federal participation is applied to the net amount determined by deducting the income from total allowable costs and third-party in-kind contributions. The income shall be used for current costs unless the granting agency authorizes deferral to a later period.

(2) To illustrate this alternative, assume a project in which the grantee incurs $100,000 of allowable costs and receives no third-party in-kind contributions. If the grantee earns $10,000 in general program income and this alternative applies, that $10,000 must be deducted from the $100,000 before applying the maximum percentage of Federal participation. If that percentage is 90 percent, the most that could be paid to the grantee would therefore be $81,000 (90 percent times $90,000).

(d) *Cost-sharing or matching alternative.* (1) Under this alternative, the income is used for allowable costs of the project or program but, in this case, the costs borne by the income may count toward satisfying a cost-sharing or matching requirement. Therefore, the maximum percentage of Federal participation is applied to total allowable costs and third-party in-kind contributions. The income shall be used for current costs unless the granting agency authorizes deferral to a later period.

(2) To illustrate this alternative, assume the same situation as in paragraph (c)(2) of this section. Under this alternative, the 90 percent maximum pecentage of participation would be applied to the full $100,000, and $90,000 could therefore be paid to the grantee. (It should be noted that if $20,000 of general program income is earned, only $80,000 could be paid, since a grant cannot pay for costs which have been borne by general program income.)

(e) *Additional costs alternative.* Under this alternative, the income is used for costs which are in addition to the allowable costs of the project or program but which nevertheless further the objectives of the Federal statute under which the grant was made. Provided that the costs borne by the income further the broad objectives of that statute, they need not be of a kind that would be permissible as charges to Federal funds.

Examples of purposes for which the income may be used are:

(1) Expanding the project or program.

(2) Continuing the project or program after grant or subgrant support ends.

(3) Supporting other projects or programs that further the broad objectives of the statute.

(4) Obtaining equipment or other assets needed for the project or program or for other activities that further the statute's objectives.

§ 74.43 Program income—proceeds from sale of real property and from sale of equipment and supplies acquired for use.

The following kinds of program income shall be governed by subpart O of this part:

(a) Proceeds from the sale of real property purchased or constructed under a grant or subgrant.

(b) Proceeds from the sale of equipment and supplies fabricated or purchased under a grant or subgrant and intended primarily for use in the grant- or subgrant-supported project or program rather than for sale or rental.

§ 74.44 Program income—royalties and other income earned from a copyrighted work.

(a) This section applies to royalties, license fees, and other income earned by a recipient from a copyrighted work developed under the grant or subgrant. Income of that kind is covered by this section whether a third party or the recipient itself acts as the publisher, seller, exhibitor, or performer of the copyrighted work. In some cases the recipient incurs costs to earn the income but does not charge these costs to HHS grant funds, to required cost-sharing or matching funds, or to other program income. Costs of that kind may be deducted from the gross income in order to determine how much must be treated as program income.

(b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no HHS requirements governing the disposition. A grantee is not prohibited from imposing requirements of its own on the disposition of this kind of income which is earned by its subgrantees provided those requirements are in addition to and not inconsistent with any requirements imposed by the terms of the grant.

§ 74.45 Program income—royalties or equivalent income earned from patents or from inventions.

Disposition of royalties or equivalent income earned on patents or inventions arising out of activities assisted by a grant or subgrant shall be governed by determinations made or agreements entered into under HHS's patent regulations. (See parts 6 and 8 of this title.) If the determination or agreement does not provide for the disposition of the royalties or equivalent income, the disposition shall be in accordance with the recipient's own policies.

§ 74.46 Program income—income after grant or subgrant support not otherwise treated.

(a) This section applies to program income not treated elsewhere in this part which arises from or is attributable to an activity while supported by a grant or subgrant but which does not accrue until after the period of grant or subgrant support. An example is proceeds from the sale or rental of a residual inventory of merchandise fabricated or purchased by a grant-supported workshop during the period of support.

(b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no HHS requirements governing the disposition. A grantee is not prohibited from imposing requirements of its own on the disposition of this kind of income which is earned by its subgrantees provided those requirements are in addition to and not inconsistent with any requirements imposed by the terms of the grant.

§ 74.47 Interest earned on advances of grant funds.

(a) Except when exempted by Federal statute (see paragraph (b) of this section for the principal exemption), grantees shall remit to the Federal Government any interest or other investment income earned on advances of HHS grant funds. This includes any interest or investment income earned by subgrantees and cost-type contractors on advances to them that are attributable to advances of HHS grant funds to the grantee. Unless the grantee receives other instructions from the responsible HHS official, the grantee shall remit the amount due by check or money order payable to the Department of Health and Human Services.

(b) In accordance with the Intergovernmental Cooperation Act of 1968 (Pub. L. 90-577), States, as defined in the act, shall not be accountable to the Federal Government for interest or investment income earned by the State itself, or by its subgrantees, where this income is attributable to grants-in-aid, as defined in the act (42 U.S.C. 4213).[1]

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[1] "State" is defined in the act to include any agency or instrumentality of a State, and the definition does not exclude a hospital or institution of higher education which is such an agency or instrumentality. "Grant-in-aid" is defined in the act to ex-

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(c) Recipients are cautioned that they are subject to the provisions in § 74.61(e) for minimizing the time between the transfer of advances and their disbursement. Those provisions apply even if there is no accountability to the Federal Government for interest or other investment income earned on the advances.

Subpart G—Cost Sharing or Matching

§ 74.50 Scope of subpart.

(a) This subpart contains rules for satisfying Federal requirements for cost sharing or matching. These rules apply whether the cost sharing or matching is required by Federal statute or by other terms of the grant.

(b) HHS and a grantee may enter into an institutional cost-sharing agreement covering all of HHS's research project grants to that grantee in the aggregate. Except as provided by the institutional cost-sharing agreement, this subpart applies to the satisfaction of the grantee's obligation under the agreement, as well as to the satisfaction of cost-sharing or matching requirements that apply only to a single grant.

§ 74.51 Definitions.

For purposes of this subpart:

"Cost sharing or matching" means the value of third-party in-kind contributions and that portion of the costs of a grant-supported project or program not borne by the Federal Government.

"Equipment" has the same meaning given to that term in § 74.132, except that instead of "acquisition cost," the words "market value at the time of donation" shall be substituted.

"Supplies" means all tangible personal property other than "equipment" as defined in this section.

"Third-party in-kind contributions" means property or services which benefit a grant-supported project or program and which are contributed by non-Federal third parties without charge to the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant.

§ 74.52 Basic rule: Costs and contributions acceptable.

With the qualifications and exceptions listed in § 74.53, a cost-sharing or matching requirement may be satisfied by either or both of the following:

(a) Allowable costs incurred by the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(b) The value of third-party in-kind contributions applicable to the period to which the cost-sharing or matching requirement applies.

§ 74.53 Qualifications and exceptions.

(a) *Costs borne by other Federal grants.* (1) Except as provided by Federal statute, a cost-sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to costs borne by general program income earned from a contract awarded under another Federal grant.

(2) For the purposes of this part, general revenue sharing funds under 31 U.S.C. 1221 are not considered a Federal grant. Therefore, in the absence of any provision of Federal statute to the contrary, allowable costs borne by these funds may count towards satisfying a cost-sharing or matching requirement.

(b) *Costs or contributions counted towards other Federal cost-sharing requirements.* Neither costs nor the values of third-party in-kind contributions may count towards satisfying a cost-sharing or matching requirement of an HHS grant if they have been or will be counted towards satisfying a cost-sharing or matching requirement of another Federal grant, a Federal procurement contract, or any other award of Federal funds.

(c) *Costs financed by general program income.* Costs financed by general program income, as defined in § 74.42, shall not count towards satisfying a cost-sharing or matching require-

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Footnote continued

clude "payments under research and development contracts or grants which are awarded directly and on similar terms to all qualifying organizations, whether public or private." (42 U.S.C. 4201) ment of the HHS grant supporting the activity giving rise to the income unless the terms of the grant expressly permit the income to be used for cost sharing or matching. (This is the alternative for use of general program income described in § 74.42(d).)

(d) *Records.* Costs and third-party in-kind contributions counting towards satisfying a cost-sharing or matching requirement must be verifiable from the records of recipients or cost-type contractors. These records must show how the value placed on third-party in-kind contributions was arrived at. To the extent feasible, volunteer services shall be supported by the same methods that the organization uses to support the allocability of its regular personnel costs.

(e) *Special standards for third-party in-kind contributions.* (1) Third-party in-kind contributions shall count towards satisfying a cost-sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(2) A third-party in kind contribution shall not count as direct cost sharing or matching where, if the party receiving the contribution were to pay for it, the payment would be an indirect cost. Cost-sharing or matching credit for such contributions shall be given only if the recipient or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions. (Information on how to establish these rates can be obtained from the Division of Cost Allocation in any HHS regional office's Regional Administrative Support Center.)

(3) The values placed on third-party in-kind contributions for cost-sharing or matching purposes shall conform to the rules in the succeeding sections of this subpart. If a third-party in-kind contribution is of a type not treated in those sections, the value placed upon it shall be fair and reasonable.

§ 74.54 Valuation of donated services.

(a) *Volunteer services.* Unpaid services provided to a recipient by individuals shall be valued at rates consistent with those ordinarily paid for similar work in the recipient's organization. If the recipient does not have employees performing similar work, the rates shall be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(b) *Employees of other organizations.* When an employer other than a recipient or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services shall be valued at the employee's regular rate of pay exclusive of the employer's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (a) of this section shall apply.

§ 74.55 Valuation of donated supplies and loaned equipment or space.

(a) If a third party donates supplies, the contribution shall be valued at the market value of the supplies at the time of donation.

(b) If a third party donates the use of equipment or space in a building but retains title, the contribution shall be valued at the fair rental rate of the equipment or space.

§ 74.56 Valuation of donated equipment, buildings, and land.

If a third party donates equipment, buildings, or land, and title passes to a recipient, the treatment of the donated property shall depend upon the purpose of the grant or subgrant, as follows:

(a) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the recipient in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(b) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, the following rules apply:

(1) If approval is obtained from the awarding party, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be

counted as cost sharing or matching. In the case of a subgrant, the terms of the HHS grant may require that the approval be obtained from the granting agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or buildings or a purchase or rental of the land would be approved as an allowable direct cost.

(2) If approval is not obtained under paragraph (b)(1) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third-party in-kind contributions. Instead, they are treated as costs incurred by the recipient. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in subpart Q of this part, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

§ 74.57 Appraisal of real property.

In some cases under §§ 74.55 and 74.56, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the granting agency may require that the market value or fair rental rate be established by a certified real property appraiser (or by a representative of the U.S. General Services Administration, if available) and that the value or rate be certified by a responsible official of the party to which the property or its use is donated. For subgrants, this requirement may also be imposed by the grantee.

Subpart H—Standards for Grantee and Subgrantee Financial Management Systems and Audits

§ 74.60 Scope of subpart.

(a) This subpart contains standards for financial management systems and non-Federal audits of recipients.

(b) Awarding parties may not impose on recipients additional financial management standards or requirements concerning non-Federal audits. They may, however, provide recipients with suggestions and assistance on these subjects

[45 FR 35329, May 27, 1960]

§ 74.61 Financial Management Standards.

Grantees and subgrantees shall meet the following standards for their grant and subgrant financial management systems.

(a) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of each project or program shall be made in accordance with the financial reporting requirements of the grant or subgrant. The terms of grants and subgrants shall not require financial reporting on the accrual basis if the recipient's accounting system is maintained on the cash basis. When accrual reporting is statutorily required, a recipient whose accounting system is not maintained on that basis shall not be required to convert it to the accrual basis; the recipient may develop the accrual information through an analysis of the documentation on hand.

(b) *Accounting records.* Records which identify adequately the source and application of funds for grant- or subgrant-supported activities shall be maintained. These records shall contain information pertaining to grant or subgrant awards, authorizations, obligations, unobligated balances, assets, outlays, income, and, if the recipient is a government, liabilities.

(c) *Internal control.* Effective control and accountability shall be maintained for all grant or subgrant cash, real and personal property covered by subpart O of this part, and other assets. Recipients shall adequately safeguard all such property and shall assure that it is used solely for authorized purposes.

(d) *Budgetary control.* The actual and budgeted amounts for each grant or subgrant shall be compared. If appropriate or specifically required, recipients shall relate financial information to performance or productivity data, including the production of unit cost information. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(e) *Advance payments.* Procedures shall be established to minimize the time elapsing between the advance of Federal grant or subgrant funds and their disbursement by the recipient. When advances are made by a letter-of-credit method, the recipient shall make drawdowns as close as possible to the time of making disbursements. Grantees advancing cash to subgrantees shall conform sustantially to the same standards of timing and amount as apply to advances by Federal agencies to grantees, including requirements for timely reporting of cash disbursements and balances. (See subpart K of this part.)

(f) *Allowable costs.* Procedures shall be established for determining the reasonableness, allowability, and allocability of costs in accordance with the applicable cost principles prescribed by subpart Q of this part and the terms of the grant.

(g) *Source documentation.* Accounting records shall be supported by source documentation such as cancelled checks, paid bills, payrolls, contract and subgrant award documents, etc.

(h) *Audit resolution.* Each recipient shall follow a systematic method to assure timely and appropriate resolution of audit findings and recommendations.

[45 FR 22576, Apr. 3, 1980, as amended at 45 FR 35329, May 27, 1980]

§ 74.62 Non-Federal audits.

(a) *Governmental recipients.* Recipients that are governments shall comply with the reqirements concerning non-Federal audits in OMB Circular No. A-102, including any amendments to those requirements published in the FEDERAL REGISTER by OMB.[1]

(b) *All other recipients.* Recipients that are not governments shall comply with the requirements concerning non-Federal audits in OMB Circular No. A-110, including any amendments to those requirements published in the FEDERAL REGISTER by OMB.[1]

[45 FR 35329, May 27, 1980; 45 FR 36415, May 30, 1980]

Subpart I—Financial Reporting Requirements

§ 74.70 Scope and applicability of subpart.

(a) This subpart prescribes requirements and forms for grantees to report financial information to HHS, and to request grant payments when a letter of credit is not used.

(b) This subpart need not be applied by grantees in dealing with their subgrantees. However, grantees are encouraged not to impose on subgrantees more burdensome requirements than HHS imposes on grantees.

§ 74.71 Definitions.

As used in this subpart or in the forms identified by this subpart:

"Accrued expenditures" are the charges by grantee during a given period requiring the provision of funds for: (a) Goods and other tangible property received; (b) services performed by employees, contractors, subgrantees, and other payees; and (c) amounts "becoming owed" for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

"Accrued income" is the sum of (a) earnings during a given period from services performed by the grantee and from goods and other tangible property delivered to purchasers, and (b) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

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[1] OMB Circulars A-102 and A-110 are available on request from the Office of Management and Budget, Publications Room, New Executive Office Building, Washington, D.C. 20503. Here is a summary of some of the main provisions concerning non-Federal audits in those two circulars:

(1) Each recipient must have itself audited by non-Federal auditors at least every two years.

(2) The recipient's auditors must meet certain standards of independence.

(3) The audit is to be performed on an organization-wide basis, with appropriate sampling of grant-related transactions. Awarding parties may not impose grant-by-grant (or subgrant-by-subgrant) audit requirements.

"Federal funds authorized" means the total amount of Federal funds obligated by the Federal Government and authorized for use by the grantee.

"In-kind contributions" means "third-party in-kind contributions" as defined in subpart G of this part.

"Obligations" are the amounts of orders placed, contracts and subgrants awarded, services received, and similar transactions during a given period, which will require payment during the same or a future period.

"Outlays" are charges made to the grant project or program. Outlays may be reported on a cash or accrual basis.

"Program income" has the same meaning it has in subpart F of this part.

"Unobligated balance" is the portion of the Federal funds authorized which has not been obligated by the grantee and is determined by deducting the grantee's cumulative obligations from the cumulative Federal funds authorized.

"Unliquidated obligations," for reports prepared on a cash basis, are the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they are the amount of obligations incurred by the grantee for which an outlay has not been recorded.

§ 74.72 General.

(a) Except as provided in paragraphs (d) and (e) of this section, grantees shall use only the forms specified in §§ 74.73 through 74.76, and such supplementary or other forms as may from time to time be authorized by OGP, for:

(1) Submitting grant financial reports to granting agencies, or

(2) Requesting advances or reimbursements when letters of credit are not used.

(b) Grantees shall follow all applicable standard instructions issued by OMB for use in connection with the forms specified in §§ 74.73 through 74.76. Granting agencies may issue substantive supplementary instructions only with the approval of OGP. Granting agencies may shade out or instruct the grantee to disregard any line item that the granting agency finds unnecessary for its decision making purposes.

(c) Grantees will not be required to submit more than the original and two copies of forms required under this subpart.

(d) Granting agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Granting agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed formats.

(e) When a granting agency has determined that a grantee's accounting system does not meet the standards for financial management systems contained in subpart H of this part, it may require financial reports with more frequency or more detail (or both), upon written notice to the grantee (without regard to § 74.7), until such time as the standards are met.

(f) HHS may waive any report required by this subpart if not needed.

(g) Granting agencies may extend the due date for any financial report upon receiving a justified request from the grantee.

§ 74.73 Financial Status Report.

(a) *Form.* Grantees shall use Standard Form 269, Financial Status Report, to report the Status of funds for all nonconstruction grants.

(b) *Accounting basis.* Each grantee shall report program outlays and program income on the same accounting basis, i.e., cash or accrued expenditure (accrual), which it uses in its accounting system.

(c) *Frequency.* The granting agency may prescribe the frequency of the report for each project or program. However, the report shall not be required more frequently than quarterly except as provided in §§ 74.7 and 74.72(e). If the granting agency does not specify the frequency of the report, it shall be submitted annually. A final report shall be required upon expiration or termination of grant support.

(d) *Due date.* When reports are required on a quarterly or semiannual basis, they shall be due 30 days after the reporting period. When required on an annual basis, they shall be due 90 days after the grant year. Final reports shall be due 90 days after the expiration or termination of grant support.

§ 74.74 Federal Cash Transactions Report.

(a) *Form.* (1) For grants paid by letters of credit (or Treasury check advances) through any HHS payment office except the Departmental Federal Assistance Financing System (DFAFS), the grantee shall submit to the payment office Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a. For grants paid by DFAFS, the grantee shall submit DFAFS Report 27, Recipient Report of Expenditures, to DFAFS.

(2) These reports will be used by the HHS payment office to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment: *Provided,* That the information to be submitted is not changed in substance.

(b) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(c) *Cash in hands of secondary recipients.* When considered necessary and feasible by the responsible HHS payment office, grantees may be required to report the amount of cash subadvances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(d) *Frequency and due date.* Grantees shall submit the report no later than 15 working days following the end of each quarter. However, where a letter of credit authorizes advances at an annualized rate of one million dollars or more, the HHS payment office may require the report to be submitted within 15 working days following the end of each month.

§ 74.75 Request for Advance or Reimbursement.

(a)(1) *Advance payments.* Requests for Treasury check advance payments shall be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form is not used for drawdowns under a letter of credit or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under non-construction grants shall also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see § 74.76(a).)

(b) The frequency for submitting payment requests is treated in § 74.96.

§ 74.76 Outlay report and request for reimbursement for construction programs.

(a) *Construction grants paid by reimbursement method.* (1) Requests for reimbursement under construction grants shall be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Granting agencies may, however, prescribe the Request for Advance or Reimbursement form specified in § 74.75 instead of this form.

(2) The frequency for submitting reimbursement requests is treated in § 74.96.

(b) *Construction grants paid by letter of credit or Treasury check advance.* (1) When a construction grant is paid by letter of credit or Treasury check advances, the grantee shall report its outlays to the granting agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The granting agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 74.73(c) and (d).

(2) When a construction grant is paid by Treasury check advances based on periodic requests from the

grantee, the advances shall be requested on the form specified in § 74.75.

(3) The granting agency may substitute the Financial Status Report specified in § 74.73 for the Outlay Report and Request for Reimbursement.

(c) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 74.73(b).

Subpart J—Monitoring and Reporting of Program Performance

§ 74.80 Scope of subpart.

This subpart sets forth the procedures for monitoring and reporting program performance of recipients. These procedures are designed to place reliance on recipients to manage the day-to-day operations of their grant- and subgrant-supported activities.

§ 74.81 Monitoring by recipients.

Recipients shall monitor the performance of grant- and subgrant-supported activities. They shall review each program, function, or activity to assure that adequate progress is being made towards achieving the goals of the grant or subgrant.

§ 74.82 Performance reports under nonconstruction grants.

(a) Where the granting agency determines that performance information sufficient to meet its programmatic needs will be available from subsequent applications, the granting agency will require the grantee to submit a performance report only upon expiration or termination of grant support. This report will be due on the same date as the final financial Status Report unless waived by the granting agency. Note that the "Application for Federal Assistance (Nonconstruction Programs)" prescribed by subpart N of this part, when used to request continued support, provides information substantially equivalent to a performance report.

(b) Except as provided in paragraph (a) of this section, grantees shall submit annual performance reports unless the granting agency requires quarterly or semiannual reports. Annual reports shall be due 90 days after the grant year; quarterly or semiannual reports shall be due 30 days after the reporting period. A final performance report shall be due 90 days after the expiration or termination of grant support. Granting agencies may extend the due date for any performance report upon receiving a justified request from the grantee. In addition, granting agencies may waive the requirement for any performance report which is not needed.

(c) The content of performance reports shall conform to any instructions issued by the granting agency, including, to the extent appropriate to the particular grant, a brief presentation of the following for each program, function, or activity involved:

(1) A comparison of actual accomplishments to the goals established for the period. Where the output of the project or program can be readily expressed in numbers, a computation of the cost per unit of output may be required if that information will be useful.

(2) The reasons for slippage if established goals were not met.

(3) Other pertinent information including, when appropriate, analysis and explanation of unexpectedly high overall or unit costs.

(d) Grantees will not be required to submit more than the original and two copies of performance reports.

(e) Grantees shall adhere to the standards in paragraphs (a) through (d) of this section in prescribing performance reporting requirements for subgrantees.

§ 74.83 Performance reports under construction grants.

In general, awarding parties rely heavily on on-site technical inspection and certified percentage-of-completion data to keep themselves informed as to progress under construction grants and subgrants. Formal performance reports to supplement those sources of information shall be required only if considered necessary by the awarding party, and in no case more frequently than quarterly.

§ 74.84 Significant developments between scheduled reporting dates.

Between the scheduled performance reporting dates, events may occur which have significant impact upon the grant- or subgrant-supported activity. In such cases, the recipient shall inform the awarding party as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to attain the objective of the award. This disclosure shall be accompanied by a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected.

§ 74.85 Site visits.

Site visits may be made as necessary by representatives of HHS to:

(a) Review program accomplishments and management control systems.

(b) Provide such technical assistance as may be required.

Subpart K—Grant and Subgrant Payment Requirements

§ 74.90 Scope of subpart.

This subpart prescribes the basic standard and the methods under which HHS will make grant payments to grantees, and grantees will make subgrant payments to their subgrantees.

§ 74.91 Definitions.

As used in this subpart:

"Advance by Treasury check" is a payment made by a Treasury check to a grantee, upon its periodic request or through the use of predetermined payment schedules, before payments are made by the grantee.

"Letter of credit" is an instrument certified by an authorized official which authorizes a recipient to draw funds needed for immediate disbursement in accordance with Treasury Circular No. 1075.

"Percentage of completion method" refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's rate of disbursements.

§ 74.92 Basic standard.

Methods and procedures for making payments to recipients shall minimize the time elapsing between the transfer of funds and the recipient's disbursements.

§ 74.93 Payment methods under nonconstruction grants.

(a) Letters of credit will be used to pay HHS grantees when all of the following conditions exist:

(1) There is or will be a continuing relationship between the grantee and the HHS payment office for at least a year and the total amount of advances to be received from the HHS payment office is $120,000 or more per year,

(2) The grantee has maintained, or demonstrated to HHS the willingness and ability to maintain, procedures that minimize the time elapsing between the transfer of funds from the Treasury and their disbursement by the grantee, and

(3) The grantee's financial management system meets the standards for fund control and accountability in Subpart H of this part.

(b) Advances by Treasury check will be used, in accordance with Treasury Circular No. 1075, when the grantee does not meet the requirements in paragraph (a)(1) of this section but does meet the requirements in paragraphs (a) (2) and (3) of this section.

(c) Reimbursement by Treasury check will be preferred method when the requirements of either paragraph (a)(2) or paragraph (a)(3) of this section are not met. This method may also be used when the major portion of the program is accomplished through private market financing or Federal loans, and the Federal grant assistance constitutes a minor portion of the program.

§ 74.94 Payment methods under construction grants.

(a) Reimbursement by Treasury check shall be the preferred method when the grantee does not meet the requirements specified in § 74.93(a) (2) or (3), and may be used for any HHS construction grant unless HHS has entered into an agreement with the grantee to use a letter of credit for all HHS grants, including construction grants.

(b) When the reimbursement by Treasury check method is not used, § 74.93 (a) and (b) shall apply to the construction grant. Implementing procedures under § 74.93 (a) and (b) will be insofar as possible the same for construction grants as for nonconstruction grants awarded to the same grantee.

(c) HHS will not use the percentage of completion method to pay its construction grants. The grantee may use that method to pay its construction contractor, but if it does, HHS's payments to the grantee will nevertheless be based on the grantee's actual rate of disbursements.

§ 74.95 Withholding of payments.

(a) Unless otherwise required by Federal statute, payments for proper charges incurred by grantees will not be withheld unless (1) the grantee has failed to comply with Federal reporting requirements or (2) the grant is suspended pursuant to § 74.114 or (3) the grantee owes money to the United States and collection of the debt by withholding grant payments will not impair the accomplishment of the objectives of any grant program sponsored by the United States.

(b) Cash withheld for failure to comply with reporting requirements but without suspension of the grant will be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 74.114. When a debt is to be collected, HHS may withhold payments or require appropriate accounting adjustments to recorded grant cash balances for which the grantee is accountable to the Federal Government, in order to liquidate the indebtedness.

§ 74.96 Requesting advances or reimbursements.

(a) If advances are made by Treasury check and the advances are not prescheduled, the grantee shall submit its requests for payment monthly. Less frequent requests are not permitted because they would result in advances covering excessive periods of time. The grantee shall not request advances in excess of the Federal share of reasonable estimates of its outlays for the month covered. The grantee shall make these estimates on a cash basis, even if it uses an accrual accounting system.

(b) If payments are made through reimbursement by Treasury check:

(1) The grantee may submit its requests for reimbursement monthly and may submit them more often if authorized. The grantee will be paid as promptly as possible, ordinarily within 30 days after receipt of a proper request for reimbursement.

(2) The grantee shall not request reimbursement for the Federal share of amounts withheld from contractors to ensure satisfactory completion of work until after it makes those payments. To meet this requirement, a grantee with an accural accounting system need not convert to cash basis accounting. It may bill in general on an accrued cost basis, handling these retained amounts as adjustments in the billing system.

(c) The forms for requesting advances or reimbursements are identified in Subpart I of this part.

[45 FR 37667, June 3, 1980]

§ 74.97 Payments to subgrantees.

Grantees shall observe the requirements of this subpart in making (or withholding) payments to subgrantees, with the following exceptions:

(a) Advance payment by check may be used instead of letter of credit;

(b) The forms specified in subpart I of this part for requesting advances and reimbursements are not required to be used by subgrantees; and

(c) The reimbursement by check method may be used to pay any construction subgrant, whether or not HHS has agreed to use a letter of credit for all direct HHS grants to that same recipient.

Subpart I—Programmatic Changes and Budget Revisions

§ 74.100 Scope and applicability of this subpart.

(a) *Scope.* This subpart deals with prior approval requirements for post-award programmatic changes and budget revisions by recipients.

(b) *Exemption of mandatory grants.* Sections 74.103 through 74.106 do not apply to programmatic changes or budget revisions made by grantees under State plan or other grants which the granting agency is required by law to award if the applicant meets all applicable requirements for entitlement. (These are generally called "mandatory" or "formula" grants.)

(c) *Exemption of certain subgrants.* Sections 74.103 through 74.106 do not apply to subgrants from States to their local governments under a mandatory or formula grant, if the local government is not required to apply for the subgrant on a project basis. Generally, such exempt subgrants will occur under a State plan which provides for local administration of a State-wide program under State supervision.

§ 74.101 Relationship to cost principles.

The cost principles in Appendices C, D, E, and F to this part contain requirements for prior approval of certain types of costs (see § 74.176). Except when waived, those requirements apply to all grants and subgrants even if §§ 74.103 through 74.106 do not.

§ 74.102 Prior approval procedures.

(a) *For grants.* When requesting a prior approval required by this subpart, grantees shall address their requests to the responsible grants officer of the granting agency. Approvals shall not be valid unless they are in writing and signed by either the grants officer, the head of the granting agency, or the head of the granting agency's regional office.

(b) *For subgrants.* Grantees shall be responsible for reviewing requests from their subgrantees for the approvals required by this subpart and for giving or denying the approval. A grantee shall not approve any action which is inconsistent with the purpose or terms of the Federal grant. If an action by a subgrantee will result in a change in the overall grant project or budget requiring granting agency approval, the grantee shall obtain that approval before giving its approval to the subgrantee. Approvals shall not be valid unless they are in writing and signed by an authorized official of the grantee.

(c) *Timing.* Within 30 days from the date of receipt of a request for approval, the approval authority shall review the request and notify the recipient of its decision. If the request for approval is still under consideration at the end of 30 days, the approval authority shall inform the recipient in writing as to when to expect the decision.

§ 74.103 Programmatic changes.

(a) *Scope.* This section contains requirements for prior approval of departures, other than budget revisions, from approved project plans. In addition to the requirements in this section, awarding parties may require prior approval for other kinds of programmatic changes to an approved grant or subgrant project.

(b) *Changes to project scope or objectives.* The recipient shall obtain prior approval for any change to the scope or objectives of the approved project. (For construction projects, any material change in approved space utilization or functional layout shall be considered a change in scope.)

(c) *Changes in key people.* The recipient of a grant or subgrant for research (or any other kind of grant or subgrant if the terms of the award make this rule applicable) shall obtain prior approval:

(1) To continue the project during any continuous period of more than 3 months without the active direction of an approved project director or principal investigator; or

(2) To replace the project director or principal investigator (or any other persons named and expressly identified as key project people in the notice

of grant or subgrant award) or to permit any such people to devote substantially less effort to the project than was anticipated when the grant or subgrant was awarded.

(d) *Other programmatic changes.* The following shall require prior approval except to the extent explicitly included in the project plan as approved by the awarding party at the time of award:

(1) Providing financial assistance to a third party by subgranting or any other means.

(2) Tranferring to a third party, by contracting or any other means, the actual performance of the substantive programmatic work. The term "substantive programmatic work" means activities which are central to carrying out the purpose of the project, and not merely incidental. Transfer of substantive programmatic work does not include purchase of supplies, materials, or equipment; acquisition of general or incidental support services; obtaining advice; or transfer of activities whose cost is treated as an indirect cost.

(3) Providing medical care to individuals under research grants.

§ 74.104 Budgets generally.

(a) *Definitions.* In this subpart:

(1) "Budget" means the recipient's financial plan for carrying out the project or program.

(2) "Approved budget" means a budget (including any revised budget) which has been approved by the awarding party.

(b) *Research project budgets.* For research projects, approved budgets shall not include the recipient's share of project costs.

(c) *Non-research project budgets.* For non-research projects which involve cost sharing or matching, approved budgets shall ordinarily consist of a single set of figures covering total project cost (the sum of the awarding party's share and the recipient's share). However, the awarding party may specify that the recipient's share not be included in the approved budget. In no case, however, shall the approved budget be in the form of a separate set of figures for each share.

(d) *Subdivision by programmatic segments.* Some grants and subgrants encompass two or more programmatic segments (such as discrete programs, projects, functions, or types of activities). In these cases, the awarding party may require that the approved budget be subdivided to show the anticipated cost of each programmatic segment.

§ 74.105 Budget revisions—nonconstruction projects.

(a) Except as provided in paragraph (b) of this section, the recipient of a grant or subgrant having an approved budget shall obtain prior approval for any budget revision which will:

(1) Involve transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or

(2) Involve transfer of amounts previously budgeted for student support (tuition waivers, stipends, and other payments to or for trainees), or

(3) Result in a need for the award of additional funds, e.g., an increase in the base upon which indirect costs are calculated which will increase allocable indirect costs and result in a claim for a supplementary award.

(b) Any or all of the prior approval requirements in paragraph (a) of this section may be waived by the awarding party.

(c) Except as provided in §§ 74.107 and 74.176, other budget changes under nonconstruction grants do not require approval.

§ 74.106 Budget revisions—construction projects.

Unless provided otherwise by the terms of the grant or subgrant, revisions to construction project budgets do not require approval.

§ 74.107 Construction and nonconstruction work under the same grant or subgrant.

When a grant or subgrant provides support for both construction and nonconstruction work, the awarding party may require prior approval before any fund or budget transfers between the two types of work.

§ 74.108 Authorized funds exceeding needs.

The recipient shall notify the awarding party promptly whenever the amount of grant or subgrant authorized funds is expected to exceed needs by more than $5,000 or 5 percent of the grant or subgrant, whichever is greater. This notification will not be required under continuing grants or subgrants if the application for the next period's funding will include an estimate of what the unobligated balance of authorized funds will be at the end of the current period.

Subpart M—Grant and Subgrant Closeout, Suspension, and Termination

§ 74.110 Definitions.

"Grant closeout" means the process by which a granting agency determines that all applicable administrative actions and all required work of the grant have been completed by the grantee and the granting agency.

"Suspension" of a grant means temporary withdrawal of the grantee's authority to obligate grant funds pending corrective action by the grantee or a decision to terminate the grant.

"Termination" of a grant means permanent withdrawal of the grantee's authority to obligate previously awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee. "Termination" does not include:

(a) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(b) Refusal by the granting agency to extend a grant or award additional funds (such as refusal to make a competing or noncompeting continuation, renewal, extension, or supplemental award);

(c) Withdrawal of the unobligated balance as of the expiration of a grant;

(d) Annulment, i.e., voiding, of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

§ 74.111 Closeout.

(a) Each grant shall be closed out as promptly as is feasible after expiration or termination.

(b) In closing out HHS grants, the following shall be observed:

(1) Upon request, HHS shall promptly pay the grantee for any allowable reimbursable costs not covered by previous payments.

(2) The grantee shall immediately refund or otherwise dispose of, in accordance with instructions from HHS, any unobligated balance of cash advanced to the grantee.

(3) The grantee shall submit, within 90 days of the date of expiration or termination, all financial, performance, and other reports required by the terms of the grant. HHS may extend the due date for any report upon receiving a justified request from the grantee, and may waive any report which is not needed.

(4) The granting agency shall make a settlement for any upward or downward adjustment of the Federal share of costs, to the extent called for by the terms of the grant.

(c)(1) The closeout of a grant does not affect the retention period for, or Federal rights of access to, grant records. See subpart D of this part.

(2) If a grant is closed out without audit, the granting agency retains the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

(3) The closeout of a grant does not affect the grantee's responsibilities with respect to property under subpart O of this part, or with respect to any program income for which the grantee is still accountable under subpart F of this part.

§ 74.112 Amounts payable to the Federal Government.

For each grant, the following sums shall constitute a debt or debts owed by the grantee to the Federal Government, and shall, if not paid upon demand, be recovered from the grantee or its successor or assignees by setoff or other action as provided by law:

(a) Any grant funds paid to the grantee by the Federal Government in excess of the amount to which the grantee is finally determined to be entitled under the terms of the grant;

(b) Any interest or other investment income earned on advances of grant funds which is due the Federal Government pursuant to § 74.47;

(c) Any royalties or other special classes of program income which, under the terms of the grant, are required to be remitted to the Federal Government (see subpart F of this part);

(d) Any amounts due the Federal Government under subpart O of this part; and

(e) Any other amounts finally determined to be due the Federal Government under the terms of the grant.

§ 74.113 Violation of terms.

(a) When a grantee has materially failed to comply with the terms of a grant, the granting agency may suspend the grant, in accordance with § 74.114, terminate the grant for cause, as provided in § 74.115, or take such other remedies as may be legally available and appropriate in the circumstances.

(b) If a project or program is supported over two or more funding periods, a grant may be suspended or terminated in the current period for failure to submit a report still due from a prior period.

§ 74.114 Suspension.

(a) When a grantee has materially failed to comply with the terms of a grant, the granting agency may, upon reasonable notice to the grantee, suspend the grant in whole or in part. The notice of suspension will state the reasons for the suspension, any corrective action required of the grantee, and the effective date. The suspension may be made effective at once if a delayed effective date would be unreasonable considering the granting agency's responsibilities to protect the Federal Government's interest. Suspensions shall remain in effect until the grantee has taken corrective action satisfactory to the granting agency, or given evidence satisfactory to the granting agency that such corrective action will be taken, or until the granting agency terminates the grant.

(b) New obligations incurred by the grantee during the suspension period will not be allowed unless the granting agency expressly authorizes them in the notice of suspension or an amendment to it. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension or termination. At the discretion of the granting agency, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(c) Appropriate adjustments to payments under the suspended grant will be made either by withholding subsequent payments or by not allowing the grantee credit for disbursements made in payment of unauthorized obligations incurred during the suspension period.

§ 74.115 Termination.

(a) *Termination for cause.* The granting agency may terminate any grant in whole, or in part, at any time before the date of expiration, whenever it determines that the grantee has materially failed to comply with the terms of the grant. The granting agency shall promptly notify the grantee in writing of the determination and the reasons for the termination, together with the effective date.

(b) *Termination on other grounds.* Except as provided in paragraph (a) of this section, grants may be terminated in whole or in part only as follows:

(1) By the granting agency with the consent of the grantee, in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial terminations, the portion to be terminated, or

(2) By the grantee, upon written notification to the granting agency, setting forth the reasons for such termination, the effective date, and in the case of partial terminations, the por-

tion to be terminated. However, if, in the case of a partial termination, the granting agency determines that the remaining portion of the grant will not accomplish the purposes for which the grant was made, the granting agency may terminate the grant in its entirety under either paragraph (a) or paragraph (b)(1) of this section.

(c) *Termination settlements.* When a grant is terminated, the grantee shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. The granting agency shall allow full credit to the grantee for the Federal share of the noncancellable obligations properly incurred by the grantee prior to termination.

§ 74.116 Applicability to subgrants.

Grantees shall adhere to the same standards regarding closeout, suspension, and termination of subgrants as are prescribed in this subpart for granting agencies.

Subpart N—Forms for Applying for Grants

§ 74.120 Scope of subpart.

(a) This subpart prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying to HHS for grants. This subpart is not applicable, however, to mandatory or formula grant programs which do not require applicants to apply to HHS for funds on a project basis.

(b) This subpart permits granting agencies to prescribe the form of applications by nongovernmental organizations (including hospitals and institutions of higher education operated by a government), but prescribes the use of a standard facesheet for certain of these applications.

(c) This subpart applies only to applications for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged not to adopt more detailed or burdensome application requirements for subgrants.

§ 74.121 Authorized forms and instructions for governmental organizations.

(a) In applying to HHS for grants, governments shall use only the forms specified in §§ 74.122 through 74.126, and such supplementary or other forms as may from time to time be prescribed by the granting agency with the approval of OGP.

(b) Governments will not be required to submit more than the original and two copies of their applications.

(c) Governments shall follow all applicable standard instructions promulgated by OMB for use in connection with the forms specified in §§ 74.122 through 74.126. Granting agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OGP. For any form, the granting agency may shade out or instruct the applicant to disregard any line item that is not needed.

(d) When a government applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the facesheet and any other affected pages need be submitted. Previously submitted pages whose information is still current need not be resubmitted.

§ 74.122 Preapplications for Federal Assistance for governmental organizations.

(a) When a preapplication is submitted by a government, the preapplication for Federal assistance form prescribed by OMB Circular A-102 shall be used. The purposes of preapplications shall be to:

(1) Establish communication between the applicant and the granting agency;

(2) Determine the applicant's eligibility;

(3) Determine how well the project can compete with similar applications from others in order to discourage proposals which have little or no chance for Federal funding before applicants

incur significant expenditures for preparing an application.

(b) Preapplication shall be mandatory when the potential applicant is a government and the proposed project (1) is for construction, land acquisition, or land development, and (2) would require more than $100,000 of Federal funding. The granting agency may require preapplications regardless of the type of project and regardless of the estimated amount of Federal funding. In addition, any government may submit a preapplication even when not required by the granting agency.

§ 74.123 Notice of preapplication review action for governmental organizations.

The notice of preapplication review action form prescribed by attachment M of OMB Circular No. A-102 will be used by granting agencies to inform governmental applicants of the results of the review of the preapplications submitted to them. The granting agency will send a notice to the applicant ordinarily within 45 days of the receipt of the preapplication form. If the review cannot be made within 45 days, the applicant will be informed by letter as to when the review will be completed.

§ 74.124 Application for Federal assistance (nonconstruction programs) for governmental organizations.

The applicant for Federal assistance (nonconstruction programs) form prescribed by attachment M of OMB Circular No. A-102 shall be used by governments in applying for any grant to which this subpart is applicable except where a form specified in § 74.125 or § 74.126 is to be used.

§ 74.125 Application for Federal assistance (for construction programs) for governmental organizations.

The applicant for Federal assistance (for construction programs) form prescribed by attachment M of OMB Circular No. A-102 shall be used by governments in applying for any grant whose purpose is soley or primarily construction, land acquisition, or land development.

§ 74.126 Application for Federal assistance (short form) for governmental organizations.

The applicant for Federal assistance (short form) form prescribed by attachment M of OMB Circular No. A-102 shall be used by governments in applying for any single-purpose one-time grant of less than $10,000 not requiring clearinghouse review, an environmental impact statement, or the relocation of persons, businesses, or farms. Granting agencies may, at their discretion, authorize or prescribe this form for applications for larger amounts.

§ 74.127 Authorized forms and instructions for nongovernmental organizations.

Nongovernmental organizations shall use application forms and instructions prescribed by the granting agency, except that the facesheet of such applications shall be standard form 424 for grants under programs covered by attachment A. part I, of OMB Circular No. A-95.

Subpart O—Property

GENERAL

§ 74.130 Scope and applicability of this subpart.

(a) Except as explained in paragraphs (c), (d), and (e) of this section this subpart applies to real property, equipment, and supplies acquired with grant support. To be considered acquired with grant support, some or all of the property's acquisition cost must be a direct cost under the grant, a subgrant, or a cost-type contract and must be either borne by grant funds or counted toward satisfying a grant cost-sharing or matching requirement.

(b) This subpart also deals with inventions, patents, and copyrights arising out of activities assisted by a grant or subgrant.

(c) This subpart does not apply to—

(1) Property for which only depreciation or use allowances are charged;

(2) Property donated entirely as a third-party in-kind contribution (as defined in § 74.51); or

(3) Equipment or supplies acquired primarily for sale or rental rather than for use.

(d) Equipment or supplies acquired by a contractor under a grant or subgrant shall be subject to this subpart only if, by terms of the contract, title vests in the grantee or subgrantee.

(e) For research grants that are subject to an institutional cost-sharing agreement (see § 74.50(b)), real property, equipment, and supplies shall be subject to this subpart only if at least some part of the acquisition cost is borne as a direct cost by Federal grant funds.

§ 74.131 Prohibition against additional requirements.

Recipients may follow their own property management policies and procedures: *Provided,* They observe the requirements of this subpart. Awarding parties may not impose on recipients property requirements (including property reporting requirements) not authorize by this subpart, unless specifically required by Federal statutes or Executive Orders.

§ 74.132 Definitions.

As used in this subpart:

"Acquisition" of property includes purchase, construction, or fabrication of property, but does not include rental of property or alterations and renovations of real property.

"Acquisition cost" of an item of purchased equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the equipment usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance shall be included in or excluded from the unit acquisition cost in accordance with the regular accounting practices of the organization purchasing the equipment. If the item is acquired by trading in another item and paying an additional amount, "acquisition cost" means the amount received for trade-in plus the additional outlay.

"Amount received for trade-in" of an item of equipment traded in for replacement equipment means the amount that would have been paid for the replacement equipment without a trade-in minus the amount paid with the trade-in. The term refers to the actual difference, not necessarily the trade-in value shown on an invoice.

"Equipment" means an article of tangible personal property that has a useful life of more than two years and an acquisition cost of $500 or more. Any recipient may use its own definition of equipment if its definition would at least include all items of equipment as defined here.

"Personal property" means property of any kind except real property. It may be tangible—having physical existence, or intangible—having no physical existence, such as patents, inventions, and copyrights.

"Real property" means land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

"Replacement equipment" means property acquired to take the place of other equipment. To qualify as replacement equipment, it must serve the same function as the equipment replaced and must be of the same nature or character, although not necessarily the same model, grade, or quality.

"Supplies" means all tangible personal property other than equipment.

[45 FR 22576, Apr. 3, 1980, as amended at 46 FR 30501, June 9, 1981]

§ 74.133 Title to real property, equipment, and supplies.

Subject to the obligations and conditions set forth in this subpart, title to real property, equipment, and supplies acquired under a grant or subgrant shall vest, upon acquisition, in the grantee or subgrantee respectively.

REAL PROPERTY

§ 74.134 Real property.

Except as otherwise provided by federal statutes, real property to which this subpart applies shall be subject to the following requirements, in addition to any other requirements imposed by the terms of the grant:

(a) *Use.* The property shall be used for the originally authorized purpose as long as needed for that purpose. When no longer so needed, approval of the granting agency may be requested to use the property for other purposes. Use for other purposes shall be limited to:

(1) Projects or programs supported by other Federal grants or assistance agreements.

(2) Activities not supported by other Federal grants or assistance agreements but having, nevertheless, purposes consistent with those of the legislation under which the original grant was made.

(b) *Transfer of title.* Approval may be requested from the granting agency to transfer title to an eligible third party for continued use for authorized purposes in accordance with paragraph (a) of this section. If approval is permissable under Federal statutes and is given, the terms of the transfer shall provide that the transferee shall assume all the rights and obligations of the transferor set forth in this subpart or in other terms of the grant or subgrant.

(c) *Disposition.* When the real property is no longer to be used as provided in paragraphs (a) and (b) of this section, the disposition instructions of the granting agency shall be followed. Those instructions will provide for one of the following alternatives:

(1) The property shall be sold and the Federal Government shall be paid an amount computed by multiplying the Federal share of the property (see § 74.142) times the proceeds from sale (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). Proper sales procedures shall be used that provide for competition to the extent practicable and result in the highest possible return.

(2) The recipient shall have the option either of selling the property in accordance with paragraph (c)(1) of this section or of retaining title. If title is retained, the Federal Government shall be paid an amount computed by multiplying the market value of the property by the Federal share of the property.

(3) The recipient shall transfer the title to either the Federal Government or an eligible non-Federal party named by the granting agency. The grantee shall be entitled to be paid an amount computed by multiplying the market value of the property by the non-Federal share of the property. If the property belonged to a subgrantee, see § 74.143 for subgrantee's share.

EQUIPMENT AND SUPPLIES

§ 74.135 Exemptions for equipment and supplies subject to certain statutes.

(a) Some Federal statutes, in certain circumstances, permit title to equipment or supplies acquired with grant funds to vest in the recipient without further obligation to the Federal Government or on such terms and conditions as deemed appropriate. An example of such a statute is the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, which provides this authority for equipment and supplies purchased with the funds of grants (and Federal contracts and cooperative agreements) for the conduct of basic or applied scientific research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research.

(b) If equipment is subject to a statute of the kind described in paragraph (a) of this section, it shall be exempt from the requirements in the remaining sections of this subpart. However, an item of such equipment having a unit acquisition cost of $1,000 or more shall be subject to § 74.136, concerning rights to require transfer, and, while subject to such a right, to the rules on replacement in § 74.138.

(c) If supplies are subject to a statute of the kind described in paragraph (a) of this section, they shall be exempt from all provisions of the remainder of this subpart which would otherwise apply.

§ 74.136 Rights to require transfer of equipment.

(a) *HHS right.* For items of equipment having a unit acquisition cost of $1,000 or more, the granting agency shall have the right to require transfer of the equipment (including title) to the Federal Government or to an eligible non-Federal party named by the granting agency. This right will normally be exercised by HHS granting agencies only if the project or program for which the equipment was acquired is transferred from one grantee to another. The right shall be subject to the following conditions:

(1) In order for the granting agency to exercise the right, a specific notice that it is exercising the right or considering doing so must be issued no later than the 120th day after the end of HHS grant support for the project or program for which the equipment was acquired. Furthermore:

(i) If the equipment is eligible for the exemptions in § 74.135 and ceases to be needed for the project or program for which it was acquired while the project or program is still being performed by the recipient, the notice must have been received by the grantee while the equipment was still needed for that project or program.

(ii) If the equipment is not eligible for those exemptions, the notice must have been received by the grantee before other permissible disposition of the equipment took place in accordance with § 74.139.

(2) If the right is exercised, the grantee shall be entitled to be paid any reasonable, resulting shipping or storage costs incurred, plus an amount computed by multiplying the market value of the equipment by the non-Federal share of the equipment. (See §§ 74.142 and 74.143.)

(b) *Right of parties awarding subgrants.* When a grantee awards a subgrant, it may reserve for itself a right similar to that in paragraph (a) of this section for items of equipment having a unit acquisition cost of $1,000 or more which are acquired under that subgrant. Without the approval of the granting agency, the right may be exercised only if the project or program for which the equipment was acquired is transferred to another subgrantee and only for the purpose of transferring the equipment to the new subgrantee for continued use in the project or program.

(c) *Equipment lists.* If at any time an awarding party is considering exercising its right to require transfer of equipment, it may require the recipient to furnish it a listing of all items of equipment that are subject to the right. This will enable the awarding party to determine which items, if any, should be transferred.

§ 74.137 Use of equipment.

(a) *Basic rule.* Equipment which has not been transferred under § 74.136 shall be used by the recipient in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original project or program, the recipient shall use the equipment, if needed, in other projects or programs currently or previously sponsored by the Federal Government, in the following order of priority:

(1) Projects or programs currently or previously sponsored by the same granting agency.

(2) Projects or programs currently or previously sponsored by other Federal agencies.

(b) *Shared use.* If equipment is being used less than full time in the project or program for which it was originally acquired, the recipient shall make it available for use in other projects or programs currently or previously sponsored by the Federal Government: *Provided,* Such other use will not interfere with the work on the original project or program. First preference for such other use shall be given to other projects or programs sponsored by the same granting agency.

(c) *Use by other recipients.* When the recipient can no longer use the equipment as required by paragraph (a) of this section, it may voluntarily make the equipment available for use on projects or programs currently or previously sponsored by the Federal Government which the recipient is supporting through subgrants or through non-Federal grants. If the recipient is a subgrantee, it may also voluntarily make the equipment available for use on projects or programs currently or previously sponsored by the Federal Government which are being conducted or supported by the grantee.

(d) *Other uses.* Unless the granting agency provides otherwise, while equipment is being used as described in the preceding paragraphs of this section, it may also be used part time for other purposes. However, use as described in those paragraphs shall be given priority over other uses.

§ 74.138 Replacement of equipment.

(a) Equipment may be exchanged for replacement equipment if needed. The replacement may take place either through trade-in or through sale and application of the proceeds to the acquisition cost of the replacement equipment. In either case, the transaction must be one which a prudent person would make in like circumstances.

(b) If an additional outlay to acquire the replacement equipment is charged as a direct cost to either Federal funds or required cost-sharing or matching under a Federal award, the replacement equipment shall be subject to whatever property requirements or exemptions are applicable to that award. If the award is a grant from HHS, the full acquisition cost of the replacement equipment shall determine which provisions of this subpart apply.

(c) For any replacement not covered by paragraph (b) of this section, the provisions of this subpart applicable to the equipment replaced shall carry over to the replacement equipment. However, none of the provisions of this subpart shall carry over if (1) the Federal share of the equipment replaced was 10 percent or less or (2) the product of that share times the amount received for trade-in or sale is $100 or less.

§ 74.139 Disposition of equipment.

When original or replacement equipment is no longer to be used in projects or programs currently or previously sponsored by the Federal Government, disposition of the equipment shall be made as follows:

(a) *Equipment with a unit acquisition cost of less than $1,000 and equipment with no further use value.* The equipment may be retained, sold, or otherwise disposed of, with no further obligation to the Federal Government.

(b) *All other equipment.* (1) The equipment may be retained or sold, and the Federal Government shall have a right to an amount calculated by multiplying the current market value or the proceeds from sale by the Federal share of the equipment (see § 74.142). If part of the Federal share in the equipment came from an award under which the exemptions in § 74.135 were applicable, the amount due shall be reduced pro rata. In any case, if the equipment is sold, $100 or 10 percent of the total sales proceeds, whichever is greater, may be deducted and retained from the amount otherwise due for selling and handling expenses.

(2) If the grantee's project or program for which or under which the equipment was acquired is still receiving grant support from the same Federal program and if the granting agency approves, the net amount due may be used for allowable costs of that project or program. Otherwise, the net amount must be remitted to the granting agency by check.

§ 74.140 Equipment management requirements.

Procedures for managing equipment (including replacement equipment) until transfer, replacement, or disposition takes place shall, as a minimum, meet the following requirements:

(a) Property records shall be maintained accurately. (Retention and access requirements for these records are explained in Subpart D of this part.) For each item of equipment, the records shall include:

(1) A description of the equipment, including manufacturer's model number, if any.

(2) An identification number, such as the manufacturer's serial number.

(3) Identification of the grant under which the recipient acquired the equipment.

(4) The information needed to calculate the Federal share of the equipment. (See § 74.142.)

(5) Acquisition date and unit acquisition cost.

(6) Location, use, and condition of the equipment and the date the information was reported.

(7) All pertinent information on the ultimate transfer, replacement, or disposition of the equipment.

(b) A physical inventory of equipment shall be taken and the results reconciled with the property records at least once every 2 years to verify the existence, current utilization, and continued need for the equipment. A statistical sampling basis is acceptable. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the differences.

(c) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented.

(d) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(e) Where equipment is to be sold and the Federal Government is to have a right to part or all of the proceeds, selling procedures shall be established which will provide for competition to the extent practicable and result in the highest possible return.

§ 74.141 Unused supplies.

(a) This section applies to supplies which have not yet been put to use in the project or program for which they were acquired when the grant or subgrant under which they were acquired expires or is terminated.

(b) If the unused supplies exceed $1,000 in total aggregate fair market value and are not needed for any project or program currently or previously funded by the Federal Government, the recipient may either retain or sell the supplies, and must credit the grant as follows:

(1) *Retained supplies.* The credit is computed by multiplying the Federal share of the supplies times their current market value.

(2) *Sold supplies.* The credit is computed by multiplying the Federal share of the supplies times the proceeds from sale. However, the recipient may reduce the credit by 10% of the sales proceeds, for selling and handling expenses.

(c) For possible exemptions from this section, see § 74.135.

[46 FR 30501, June 9, 1981]

FEDERAL SHARE OF REAL PROPERTY, EQUIPMENT, AND SUPPLIES

§ 74.142 Federal share of property.

Several sections of this subpart require a determination of the Federal (or non-Federal) share of real property, equipment, or supplies. In making such a determination, the following principles shall be observed:

(a) *General.* (1) Except as explained in the succeeding paragraphs of this section, the Federal share of the property shall be the same percentage as the Federal share of the acquiring party's total costs under the grant during the grant or subgrant year (or other funding period) to which the acquisition cost of the property was charged. For this purpose, "costs under the grant" means allowable costs which are either borne by the grant or counted towards satisfying a cost-sharing or matching requirement of the grant. Only costs are to be counted—not the value of third-party in-kind contributions. Moreover, if the property was acquired by a grantee that awarded subgrants, costs incurred by its subgrantees shall be included only to the extent borne by the subgrants. (For example, if a subgrantee incurred $200,000 of project costs, of which $150,000 was borne by the subgrant, only the $150,000 shall be included in the grantee's costs.)

(2) If the property is acquired by a subgrantee, the Federal share of the subgrantee's costs under the grant and hence of the property shall be calculated by multiplying the Federal share of the grantee's costs by the latter's share of the subgrantee's costs. For example, if the Federal share of a grantee's costs is 50 percent and the subgrant bears only 50 percent of a subgrantee's costs, then the Federal share of that subgrantee's costs (and of the property acquired by that subgrantee) is 25 percent.

(b) *Property acquired only partly under a grant.* (1) Sometimes only a part of the acquisition cost of an item of property is borne as a direct cost by the grant or counted as a direct cost towards a cost-sharing or matching requirement. The remainder might, for example, represent voluntary cost sharing or matching, or it might be charged to a different activity. Occasionally, the amount paid for the property is only a part of its value, and the remainder is donated as an in-kind contribution by the party that provided the property.

(2) To calculate the Federal share of such property, first determine the Federal share of the acquiring party's total costs under the grant, as explained in the paragraph (a) of this section. Then multiply that share by the percentage of the property's acquisition cost (or its market value, if the item was partly donated) which was borne as a direct cost by the grant or counted as a direct cost towards a cost-sharing or matching requirement.

(c) *Replacement equipment.* The Federal share of replacement equipment shall be calculated as follows:

(1) *Step 1.* Determine the Federal share (percentage) of the equipment replaced.

(2) *Step 2.* Determine the percentage of the replacement equipment's cost that was covered by the amount received for trade-in or the sales proceeds from the equipment replaced.

(3) *Step 3.* Multiply the step 1 percentage by the step 2 percentage.

(4) *Step 4.* If an additional outlay for the replacement equipment was charged as a direct cost either to HHS grant funds or to required cost-sharing or matching funds, calculate the Federal share attributable to that additional outlay as explained in paragraph (b)(2) of this section. Add that additional percentage to the step 3 percentage.

(d) *Institutional cost-sharing agreements.* If a grant is subject to an institutional cost-sharing agreement (see § 74.130(e)), the Federal share of property acquired under the grant shall be calculated as though there were no cost-sharing requirement applicable to the grant (that is, as if all the grantee's cost sharing were voluntary).

§ 74.143 Subgrantee's share of market value or sales proceeds.

Where this subpart requires a sharing of the market value or sales proceeds of property acquired under a subgrant, the non-Federal share shall be proportionally divided between the grantee and the subgrantee. The subgrantee shall be entitled to the amount it would have received or retained if the award to it had been made directly by the Federal Government. The remainder of the non-Federal share shall belong to the grantee.

INTANGIBLE PERSONAL PROPERTY

§ 74.144 Inventions and patents.

HHS's regulations on inventions and patents arising out of activities assisted by a grant are set forth in parts 6 and 8 of this title.

§ 74.145 Copyrights.

(a) *Works under grants.* Unless otherwise provided by the terms of the grant, when copyrightable material is developed in the course of or under a grant, the grantee is free to copyright the material or permit others to do so.

(b) *Works under subgrants.* Unless otherwise provided by the terms of the grant or subgrant, when copyrightable material is developed in the course of or under a subgrant, the subgrantee is free to copyright the material or permit others to do so.

(c) *HHS rights.* If any copyrightable material is developed in the course of or under a HHS grant or subgrant, HHS shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the work for Federal Government purposes. A grantee awarding a subgrant may reserve a similar right for itself with respect to copyrightable material developed under that subgrant.

(d) *Exemption of student-developed works.* HHS awards training grants and other kinds of grants under which individuals are provided stipends or other financial assistance for the primary purpose of aiding them to further their education or training. Except as provided by the terms of the grant, copyrightable material developed by an individual or group of individuals in the course of education or training pursued with such assistance shall not be subject to the HHS right described in paragraph (c) of this section, unless the development of the material also receives other forms of support under the same or another HHS grant (such as a research grant).

Subpart P—Procurements by Grantees and Subgrantees

SOURCE: 45 FR 37667, June 3, 1980, unless otherwise noted.

§ 74.160 What procurements are subject to this subpart?

(a) This subpart applies to recipient procurements of supplies, equipment, and services (including construction).

(b) This subpart applies if any part of the cost of the property or service being procured by a recipient is treated as a direct cost under a grant or subgrant and is either borne by grant funds or counted toward satisfying a cost-sharing or matching requirement of the Federal grant. However, for research grants subject to an institutional cost-sharing agreement (see § 74.50(b)), this subpart applies only if some part of the cost is borne by grant funds.

(c) This subpart does not apply to the acquisition of property or services by one government from another government or by one agency or instrumentality of a government from another agency or instrumentality of the same or another government.[1]

§ 74.161 What rules govern the procurements?

For procurements by governmental recipients, awarding parties and recipients shall comply with Attachment O, "Procurement Standards," of OMB Circular A-102. For procurements by nongovernmental recipients, awarding parties and recipients shall comply with Attachment O, "Procurement Standards," of OMB Circular A-110. The versions of the attachments that apply are those in effect on October 1, 1979. The texts of those versions are in Appendices G and H of this part.

§ 74.162 Must request for OMB authorizations go through HHS' Office of Grants and Procurement (OGP)?

Requests for the Office of Federal Procurement Policy approval or authorizations referred to in paragraphs 1.b, 1.c, and 14.j of the OMB Circular A-102 attachment must be submitted, through appropriate HHS granting agency channels, to OGP. If OGP concurs in the request, OGP sends it to the Office of Federal Procurement Policy of OMB.

§ 74.163 How do the rules apply to subgrants?

(a) The Attachments O of the OMB circulars apply to procurements under subgrants as well as grants, although written, for the most part, in terms of grants. Except as explained in paragraphs (b) and (c) of this section, in the case of a subgrant, text that applies to a Federal agency is to be construed as applying to the grantee awarding the subgrant and text that applies to a grantee is to be construed as applying to the recipient of the subgrant.

(b) In section 4 and paragraphs 14.d through 14.i of Attachment O of OMB Circular A-102 and in paragraphs 4.e through 4.j of Attachment O of OMB Circular A-110, the references to Federal agencies apply to Federal agencies even in the case of a subgrant.

(c) In paragraph 2.a of Attachment O of OMB Circular A-102, the reference to a Federal concern is to be construed, in the case of a subgrant, as referring to a concern of either the Federal Government or the grantee awarding the subgrant.

§ 74.164 What clarifications are needed for the rule on access to contractor records?

The Attachments O require recipients to include in specified kinds of contracts a provision for access to the contractor's records by the recipient and the Federal Government. The following applies to the provision:

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[1] Instrumentalities of a government include government institutions of higher education and government hospitals. However, those institutions and hospitals are not considered governmental organizations for the other purposes of this subpart. (See paragraph (c) of § 74.4, "Applicability of this part.")

(a) The provision must require the contractor to place the same provision in any subcontract which would have to have the provision were it awarded directly by the recipient.

(b) The provision must require retention of records for three years after final payment is made under the contract or subcontract and all pending matters are closed. The provision must also require that, if an audit, litigation, or other action involving the records is started before the end of the three-year period, the records must be retained until all issues arising out of the action are resolved or until the end of the three-year period, whichever is later.

(c) In contracts and subcontracts under a subgrant, the provision must require that access to the records be provided to the grantee as well as the subgrantee and the Federal Government.

[45 FR 37667, June 3, 1980; 45 FR 38380, June 9, 1980]

Subpart Q—Cost Principles

§ 74.170 Basic policy; scope of subpart.

Grant funds may be used only for allowable costs of the activities for which the grant was awarded. This subpart identifies the principles to be used in determining allowable costs. The principles apply to grant-support activities conducted by grantees as well as by subgrantees and cost-type contractors (and subcontractors) under grants.

[45 FR 34273, May 22, 1980]

§ 74.171 Governments.

(a) The principles to be used in determining the allowable costs of activities conducted by governments are contained in Federal Management Circular 74-4, including any amendments to the Circular published in the FEDERAL REGISTER by OMB. A copy of this Circular may be obtained from the Division of Cost Allocation in any HHS Regional Office.

(b) Unless otherwise prescribed by OMB, future amendments to the Circular shall apply as of the start of a government's first fiscal year beginning after the amendment is published in the FEDERAL REGISTER

[45 FR 34273, May 22, 1980]

§ 74.172 Institutions of higher education.

(a) The principles to be used in determining the allowable costs of activities conducted by institutions of higher education (other than for profit institutions) are contained in OMB Circular No. A-21, including any amendments to the Circular published in the FEDERAL REGISTER by OMB. A copy of this Circular may be obtained from the Division of Cost Allocation in any HHS Regional Office.

(b) Unless otherwise prescribed by OMB, future amendments to the Circular shall apply as of the start of an institution's first fiscal year beginning after the amendment is published in the FEDERAL REGISTER.

[45 FR 34273, May 22, 1980]

§ 74.173 Hospitals.

(a) *Research and development.* The principles for determining the allowable costs of research and development work performed by hospitals are in Appendix E to this part.

(b) *Other activities.* Appendix E to this part shall be used as a guide for determining the allowable costs of other activities conducted by hospitals.

§ 74.174 Other nonprofit organizations.

(a) Except as provided in paragraph (c) of this section, the principles to be used in determining allowable costs of activities conducted by nonprofit organizations (other than governments, institutions of higher education, and hospitals) are contained in OMB Circular A-122, including any amendments to the Circular published in the FEDERAL REGISTER by OMB. A copy of this Circular may be obtained from the Division of Cost Allocation in any HHS Regional Office. Unless otherwise prescribed by OMB, amendments to the Circular shall apply as of the start of an organization's first fiscal year beginning after the amendment is published in the FEDERAL REGISTER.

(b) OMB Circular A-122 does not cover the treatment of bid and proposal costs or independent research and development costs. The following rules apply to these costs for nonprofit organizations subject to the Circular:

(1) *Bid and proposal costs.* Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal grants, contracts, and agreements, including the development of scientific, cost, and other data needed to support the bids, proposals and applications. Bid and proposal costs of the current accounting period are allowable as indirect costs. Bid and proposal costs of past accounting periods are unallowable in the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable. Bid and proposal costs do not include independent research and development costs covered by paragraph (b)(2) of this section, or preaward costs covered by Attachment B, Paragraph 33, of OMB Circular A-122.

(2) *Independent research and development costs.* Independent research and development is research and development conducted by an organization which is not sponsored by Federal or non-Federal grants, contracts, or other agreements. Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to sponsored research and development. The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

(c) The principles to be used in determining allowable costs of activities conducted by the nonprofit organizations listed in Attachment C to OMB Circular A-122 are contained in Subpart 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2), except that the costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

[46 FR 30502, June 9, 1981]

§ 74.175 Subgrants and cost-type contracts.

(a) The cost principles applicable to a subgrantee or cost-type contractor under an HHS grant will not necessarily be the same as those applicable to the grantee. For example, where a State government awards a subgrant or cost-type contract to an institution of higher education, OMB Circular No. A-21 would apply to the costs incurred by the institution of higher education, even though Federal Management Circular 74-4 would apply to the costs incurred by the State.

(b) The principles to be used in determining the allowable costs of work performed by for-profit organizations (other than hospitals) under cost-type contracts awarded to them under HHS grants are in 41 CFR Subpart 1-15.2.

[45 FR 22576, Apr. 3, 1980, as amended at 45 FR 34273, May 22, 1980]

§ 74.176 Costs allowable with approval.

Each set of cost principles identifies certain costs that, in order to be allowable, must be approved by the granting agency. Other costs do not require approval. The following procedures govern approval of these costs.

(a) When costs are treated as indirect costs (or are allocated pursuant to a government-wide cost allocation plan), acceptance of the costs as part of the indirect cost rate or cost allocation plan shall constitute approval.

(b)(1) When the costs are treated as direct costs, they must be approved in advance by the awarding party.

(2) If the costs are specified in the budget, approval of the budget shall constitute approval of the costs.

(3) If the costs are not specified in the budget, or there is no approved budget, the recipient shall obtain specific prior approval in writing from the awarding party. For this purpose the prior approval procedures of § 74.102 shall be followed, except that for formula or mandatory grants, the granting agency's written approval may be signed by any authorized official of the granting agency.

(c) The awarding party may waive or conditionally waive the requirement for its approval of the costs. Such a waiver shall apply only to the requirement for approval. If, upon audit or otherwise, it is determined that the costs do not meet other requirements or tests for allowability specified by the applicable cost principles, such as reasonableness and necessity, the costs may be disallowed.

(d) In the case of subgrants and cost-type contracts, no approval shall be given which is inconsistent with the purpose or the terms of the Federal grant.

Subparts R-S-[Reserved]

Subpart T—Miscellaneous

§§ 74.250-74.303 [Reserved]

§ 74.304 Final decisions in disputes.

(a) Granting agencies and other Departmental components attempt to promptly issue final decisions in disputes and in other matters affecting the interests of grantees. However, they do not issue a final decision adverse to the grantee until it is clear that the matter cannot be resolved informally through further exchange of information and views.

(b) Under various HHS statutes or regulations, grantees have the right to appeal from, or to have a hearing on, certain final decisions by Departmental components. (See, for example, Subpart D of 42 CFR Part 50 and 45 CFR Parts 16 and 75.) Paragraphs (c) and (d) of this section set forth the standards the Department expects its components to meet in stating a final decision covered by any of the statutes or regulations.

(c) The decision is brief but contains—

(1) A complete statement of the background and basis of the component's decision, including reference to the pertinent statutes, regulations, or other governing documents; and

(2) Enough information to enable the grantee and any reviewer to understand the issues and the position of the HHS component.

(d) The following or similar language (consistent with the terminology of the applicable statutes or regulations) appears at the end of the decision: "This is the final decision of the [title of grants officer or other official responsible for the decision]. It shall be the final decision of the Department unless, within 30 days after receiving this decision, you deliver or mail (you should use registered or certified mail to establish the date) a written notice of appeal to [name and address of appropriate contact; e.g., the Departmental Grant Appeals Board, Department of Health and Human Services, Washington, D.C. 20201]. You shall attach to the notice a copy of this decision, note that you intend an appeal, state the amount in dispute, and briefly state why you think that this decision is wrong. You will be notified of further procedures."

(e) If a decision does not contain the statement, information, and language described in paragraphs (c) and (d) of this section, the decision is not necessarily the granting agency's final decision in the matter. The grantee should notify the granting agency that it wishes a formal final decision following any further exchange of views or information that might help resolve the matter informally.

[46 FR 43822, Aug. 31, 1981]

APPENDIXES A-D—[RESERVED]

APPENDIX E—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO RESEARCH AND DEVELOPMENT UNDER GRANTS AND CONTRACTS WITH HOSPITALS

I. PURPOSE AND SCOPE

A. *Objectives.* This appendix provides principles for determining the costs applicable to research and development work performed by hospitals under grants and contracts with the Department of Health and Human Services. These principles are confined to the subject of cost determination and make no attempt to identify the circumstances or dictate the extent of hospital participation in the financing of a particular research or development project. The principles are designed to provide recognition of the full allocated costs of such research work under generally accepted accounting principles. These principles will be applicable to both proprietary and non-profit hospitals. No provision for profit or other increment above cost is provided for in these principles. However, this is not to be interpreted as precluding a negotiated fee between contracting parties when a fee is appropriate.

B. *Policy guides.* The successful application of these principles requires development of mutual understanding between representatives of hospitals and of the Department of Health and Human Services as to their scope, applicability and interpretation. It is recognized that:

1. The arrangements for hospital participation in the financing of a research and development project are properly subject to negotiation between the agency and the hospital concerned in accordance with such Government-wide criteria as may be applicable.

2. Each hospital, possessing its own unique combination of staff, facilities and experience, should be encouraged to conduct research in a manner consonant with its own institutional philosophies and objectives.

3. Each hospital in the fulfillment of its contractual obligations should be expected to employ sound management practices.

4. The application of the principles established herein shall be in conformance with the generally accepted accounting practices of hospitals.

5. Hospitals receive reimbursements from the Federal Government for differing types of services under various programs such as support of Research and Development (including discrete clinical centers) Health Services Projects, Medicare, etc. It is essential that consistent procedures for determining reimbursable costs for similar services be employed without regard to program differences. Therefore, both the direct and indirect costs of research programs must be identified as a cost center(s) for the cost finding and step-down requirements of the Medicare program, or in its absence the Medicaid program.

C. *Application.* All operating agencies within the Department of Health and Human Services that sponsor research and development work in hospitals will apply these principles and related policy guides in determining the costs incurred for such work under grants and cost-reimbursement type contracts and subcontracts. These principles will also be used as a guide in the pricing of fixed-price contracts and subcontracts.

II. DEFINITIONS OF TERMS

A. "Organized research" means all research activities of a hospital that may be identified whether the support for such research is from a federal, non-federal or internal source.

B. "Departmental research" means research activities that are not separately budgeted and accounted for. Such work, which includes all research activities not encompassed under the term organized research, is regarded for purposes of this document as a part of the patient care activities of the hospital.

C. "Research agreement" means any valid arrangement to perform federally-sponsored research or development including grants, cost-reimbursement type contracts, cost-reimbursement type subcontracts, and fixed-price contracts and subcontracts.

D. "Instruction and training" means the formal or informal programs of educating and training technical and professional health services personnel, primarily medical and nursing training. This activity, if separately budgeted or identifiable with specific costs, should be considered as a cost objective for purposes of indirect cost allocations and the development of patient care costs.

E. "Other hospital activities" means all organized activities of a hospital not immediately related to the patient care, research, and instructional and training functions which produce identifiable revenue from the performance of these activities. If a non-related activity does not produce identifiable revenue, it may be necessary to allocate this expense using an appropriate basis. In such a case, the activity may be included as an allocable cost (See para. III D below.) Also included under this definition is any category of cost treated as "Unallowable," provided such category of cost identifies a function or activity to which a portion of the institution's indirect cost (as defined in para. V. A.) are properly allocable.

F. "Patient care" means those departments or cost centers which render routine or ancillary services to in-patients and/or out-patients. As used in para. IX B.23, it means the cost of these services applicable to patients involved in research programs.

G. "Allocation" means the process by which the indirect costs are assigned as between:

1. Organized research,
2. Patient care including departmental research.
3. Instruction and training, and
4. Other hospital activities.

H. "Cost center" means an identifiable department or area (including research) within the hospital which has been assigned an account number in the hospital accounting system for the purpose of accumulating expense by department or area.

I. "Cost finding" is the process of recasting the data derived from the accounts ordinarily kept by a hospital to ascertain costs of the various types of services rendered. It is the determination of direct costs by specific identification and the proration of indirect costs by allocation.

J. "Step down" is a cost finding method that recognizes that services rendered by certain nonrevenue-producing departments or centers are utilized by certain other nonrevenue producing centers as well as by the revenue-producing centers. All costs of nonrevenue-producing centers are allocated to all centers which they serve, regardless of whether or not these centers produce revenue. Following the apportionment of the cost of the nonrevenue-producing center, that center will be considered closed and no further costs are apportioned to that center.

K. "Scatter bed" is a bed assigned to a research patient based on availability. Research patients occupying these beds are not physically segregated from nonresearch patients occupying beds. Scatter beds are geographically dispersed among all the beds available for use in the hospital. There are no special features attendant to a scatter bed that distinguishes it from others that could just as well have been occupied.

L. "Discrete bed" is a bed or beds that have been set aside for occupancy by research patients and are physically segregated from other hospital beds in an environment that permits an easily ascertainable allocation of costs associated with the space they occupy and the services they generate.

III. BASIC CONSIDERATIONS

A. *Composition of total costs.* The cost of a research agreement is comprised of the allowable direct costs incident to its performance plus the allocable portion of the allowable indirect costs of the hospital less applicable credits. (See para. III-E.)

B. *Factors affecting allowability of costs.* The tests of allowability of costs under these principles are:

1. They must be reasonable.

2. They must be assigned to research agreements under the standards and methods provided herein.

3. They must be accorded consistent treatment through application of those generally accepted accounting principles appropriate to the circumstances (See para. I-E.5.) and

4. They must conform to any limitations or exclusions set forth in these principles or in the research agreement as to types or amounts of cost items.

C. *Reasonable costs.* A cost may be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefor reflect the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made. Major considerations involved in the determination of the reasonableness of a cost are:

1. Whether or not the cost is of a type generally recognized as necessary for the operation of the hospital or the performance of the research agreement,

2. The restraints or requirements imposed by such factors as arm's length bargaining, federal and state laws and regulations, and research agreement terms and conditions,

3. Whether or not the individuals concerned acted with due prudence in the circumstances, considering their responsibilities to the hospital, its patients, its employees, its students, the Government, and the public at large, and

4. The extent to which the actions taken with respect to the incurrence of the cost are consistent with established hospital policies and practices applicable to the work of the hospital generally, including Government research.

D. *Allocable costs.* 1. A cost is allocable to a particular cost center (i.e., a specific function, project, research agreement, department, or the like) if the goods or services involved are chargeable or assignable to such cost center in accordance with relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a research agreement if it is incurred solely to advance the work under the research agreement; or it benefits both the research agreement and other work of the hospital in proportions that can be approximated through use of reasonable methods; or it is necessary to the overall operation of the hospital and, in light of the standards provided in this chapter, is deemed to be assignable in part to organized research. Where the purchase of equipment or other capital items are specifically authorized under a research agreement, the amounts thus authorized for such purchases are allocable to the research agreement regardless of the use that may subsequently be made of the equipment or other capital items involved.

2. Any costs allocable to a particular research agreement under the standards provided in these principles may not be shifted to other research agreements in order to meet deficiencies caused by overruns or other fund considerations, to avoid restrictions imposed by law or by terms of the research agreement, or for other reasons of convenience.

E. *Applicable credits.* 1. The term applicable credits refers to those receipts or negative expenditure types of transactions which operate to offset or reduce expense items that are allocable to research agreements as direct or indirect costs as outlined in para. V-A. Typical examples of such transactions are: purchase discounts, rebates, or allowances; recoveries or indemnities on losses; sales of scrap or incidental services; tuition; adjustments of overpayments or erroneous charges; and services rendered to patients admitted to federally funded clinical research centers, primarily for care though also participating in research protocols.

2. In some instances, the amounts received from the Federal Government to finance

hospital activities or service operations should be treated as applicable credits. Specifically, the concept of netting such credit items against related expenditures should be applied by the hospital in determining the rates or amounts to be charged to government research for services rendered whenever the facilities or other resources used in providing such services have been financed directly, in whole or in part, by federal funds. Thus, where such items are provided for or benefit a particular hospital activity, i.e., patient care, research, instruction and training, or other, they should be treated as an offset to the indirect costs apportioned to that activity. Where the benefits are common to all hospital activities they should be treated as a credit to the total indirect cost pool before allocation to the various cost objectives.

IV. DIRECT COSTS

A. *General.* Direct costs are those that can be identified specifically with a particular cost center. For this purpose, the term cost center refers not only to the ultimate centers against which costs are finally lodged such as research agreements, but also to other established cost centers such as the individual accounts for recording particular objects or items of expense, and the separate account groupings designed to record the expenses incurred by individual organizational units, functions, projects and the like. In general, the administrative functions and service activities described in para. VI are identifiable as separate cost centers, and the expenses associated with such centers become eligible in due course for distribution as indirect costs of research agreements and other ultimate cost centers.

B. *Application to research agreements.* Identifiable benefit to the research work rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect costs of research agreements. Typical of transactions chargeable to a research agreement as direct costs are the compensation of employees for the time or effort devoted to the performance of work under the research agreement, including related staff benefit and pension plan costs to the extent that such items are consistently accorded to all employees and treated by the hospital as direct rather than indirect costs (see para. V. B4b); the costs of materials consumed or expended in the performance of such work; and other items of expense incurred for the research agreement, such as extraordinary utility consumption. The cost of materials supplied from stock or services rendered by specialized facilities or other institutional service operations may be included as direct costs of research agreements provided such items are consistently treated by the institution as direct rather than indirect costs and are charged under a recognized method of costing or pricing designed to recover only the actual direct and indirect costs of such material or service and conforming to generally accepted cost accounting practices consistently followed by the institution.

V. INDIRECT COSTS

A. *General.* Indirect costs are those that have been incurred for common or joint objectives, and thus are not readily subject to treatment as direct costs of research agreements or other ultimate or revenue producing cost centers. In hospitals such costs normally are classified but not necessarily restricted to the following functional categories: Depreciation; Administrative and General (including fringe benefits if not charged directly); Operation of Plant; Maintenance of Plant; Laundry and Linen Service; Housekeeping; Dietary; Maintenance of Personnel; and Medical Records and Library.

B. *Criteria for distribution.*—1. *Base period.* A base period for distribution of indirect costs is the period during which such costs are incurred and accumulated for distribution to work performed within that period. The base period normally should coincide with the fiscal year established by the hospital, but in any event the base period should be so selected as to avoid inequities in the distribution of costs.

2. *Need for cost groupings.* The overall objective of the allocation process is to distribute the indirect costs described in para. VI to organized research, patient care, instruction and training, and other hospital activities in reasonable proportions consistent with the nature and extent of the use of the hospital's resources by research personnel, medical staff, patients, students, and other personnel or organizations. In order to achieve this objective with reasonable precision, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the functional categories of indirect costs referred to in para. V-A. In general, the cost groupings established within a functional category should constitute, in each case, a pool of those items of expense that are considered to be of like character in terms of their relative contribution to (or degree of remoteness from) the particular cost centers to which distribution is appropriate. Each such pool or cost grouping should then be distributed individually to the related cost centers, using the distribution base or method most appropriate in the light of the guides set out in B3 below. While this paragraph places primary emphasis on a stepdown method of indirect cost computation, para. VIII provides an alternate method which may be used under certain conditions.

3. *Selection of distribution method.* Actual conditions must be taken into account in selecting the method or base to be used in distributing to related cost centers the expenses assembled under each of the individual cost groups established as indicated under B2 above. Where a distribution can be made by assignment of a cost grouping directly to the area benefited, the distribution should be made in that manner. Care should be given, however, to eliminate similar or duplicative costs from any other distribution made to this area. Where the expenses under a cost grouping are more general in nature, the distribution to related cost centers should be made through use of a selected base which will produce results which are equitable to both the Government and the hospital. In general, any cost element or cost-related factor associated with the hospital's work is potentially adaptable for use as a distribution base provided:

a. It can readily be expressed in terms of dollars or other quantitative measure (total direct expenditures, direct salaries, manhours applied, square feet utilized, hours of usage, number of documents processed, population served, and the like); and

b. It is common to the related cost centers during the base period. The essential consideration in selection of the distribution base in each instance is that it be the one best suited for assigning the pool of costs to related cost centers in accord with the relative benefits derived; the traceable cause and effect relationship; or logic and reason, where neither benefit nor cause and effect relationship is determinable.

4. *General consideration on cost groupings.* The extent to which separate cost groupings and selective distribution would be appropriate at a hospital is a matter of judgment to be determined on a case-by-case basis. Typical situations which may warrant the establishment of two or more separate cost groups (based on account classification or analysis) within a functional category include but are not limited to the following:

a. Where certain items or categories of expense relate solely to one of the major divisions of the hospital (patient care, sponsored research, instruction and training, or other hospital activities) or to any two but not all, such expenses should be set aside as a separate cost grouping for direct assignment or selective distribution in accordance with the guides provided in B2 and B3 above.

b. Where any types of expense ordinary treated as indirect cost as outlined in para. V-A are charged to research agreements as direct costs, the similar type expenses applicable to other activities of the institution must through separate cost grouping be excluded from the indirect costs allocable to research agreements.

c. Where it is determined that certain expenses are for the support of a service unit or facility whose output is susceptible of measurement on a workload or other quantitative basis, such expenses should be set aside as a separate cost grouping for distribution on such basis to organized research and other hospital activities.

d. Where organized activities (including identifiable segments of organized research as well as the activities cited in para. II-E) provide their own purchasing, personnel administration, building maintenance, or housekeeping or similar service, the distribution of such elements of indirect cost to such activities should be accomplished through cost grouping which includes only that portion of central indirect costs (such as for overall management) which are properly allocable to such activities.

e. Where the hospital elects to treat as indirect charges the costs of pension plans and other staff benefits, such costs should be set aside as a separate cost grouping for selective distribution to related cost centers, including organized research.

f. Where the hospital is affiliated with a medical school or some other institution which performs organized research on the hospital's premises, every effort should be made to establish separate cost groupings in the Administrative and General or other applicable category which will reasonably reflect the use of services and facilities by such research. (See also para. VII-A.3)

5. *Materiality.* Where it is determined that the use of separate cost groupings and selective distribution are necessary to produce equitable results, the number of such separate cost groupings within a functional category should be held within practical limits, after taking into consideration the materiality of the amounts involved and the degree of precision attainable through less selective methods of distribution.

C. *Administration of limitations on allowances for indirect costs.* 1. Research grants may be subject to laws and/or administrative regulations that limit the allowance for indirect costs under each such grant to a stated percentage of the direct costs allowed. Agencies that sponsor such grants will establish procedures which will assure that:

a. the terms and amount authorized in each case conform with the provisions of paragraphs III, V and IX of these principles as they apply to matters involving the consistent treatment and allowability of individual items of cost; and

b. the amount actually allowed for indirect costs under each such research grant does not exceed the maximum allowable under the limitation or the amount otherwise allowable under these principles, whichever is the smaller.

2. Where the actual allowance for indirect costs on any research grant must be restricted to the smaller of the two alternative amounts referred to in C1 above, such alternative amounts should be determined in accordance with the following guides:

a. The maximum allowable under the limitation should be established by applying the stated percentage to a direct cost base which shall include all items of expenditure authorized by the sponsoring agency for inclusion as part of the total cost for the direct benefit of the work under the grant; and

b. The amount otherwise allowable under these principles should be established by applying the current institutional indirect cost rate to those elements of direct cost which were included in the base on which the rate was computed.

3. When the maximum amount allowable under a statutory limitation or the terms of a research agreement is less than the amount otherwise allocable as indirect costs under these principles, the amount not recoverable as indirect costs under the research agreement involved may not be shifted to other research agreements.

VI. IDENTIFICATION AND ASSIGNMENT OF INDIRECT COSTS

A. *Depreciation or use charge.* 1. The expenses under this heading should include depreciation (as defined in para. IX-B.9a) on buildings, fixed equipment, and movable equipment, except to the extent purchased through federal funds. Where adequate records for the recording of depreciation are not available, a use charge may be substituted for depreciation (See para. IX-B.)

2. The expenses included in this category should be allocated to applicable cost centers in a manner consistent with the guides set forth in para. V-B, on a basis that gives primary emphasis to (a) space utilization with respect to depreciation on buildings and fixed equipment; and (b) specific identification of assets and their use with respect to movable equipment as it relates to patient care, organized research, instruction and training, and other hospital activities. Where such records are not sufficient for the purpose of the foregoing, reasonable estimates will suffice as a means for effecting distribution of the amounts involved.

B. *Administration and general expenses.* 1. The expenses under this heading are those that have been incurred for the administrative offices of the hospital including accounting, personnel, purchasing, information centers, telephone expense, and the like which do not relate solely to any major division of the institution, i.e., solely to patient care, organized research, instruction and training, or other hospital activities.

2. The expenses included in this category may be allocated on the basis of total expenditures exclusive of capital expenditures, or salaries and wages in situations where the results of the distribution made on this basis are deemed to be equitable both to the Government and the hospital; otherwise the distribution of Administration and General expenses should be made through use of selected bases, applied to separate cost groupings established within this category of expenses in accordance with the guides set out in para. V-B.

C. *Operation of plant.* 1. The expenses under this heading are those that have been incurred by a central service organization or at the departmental level for the administration, supervision, and provision of utilities (exclusive of telephone expense) and protective services to the physical plant. They include expenses incurred for such items as power plant operations, general utility costs, elevator operations, protection services, and general parking lots.

2. The expenses included in this category should be allocated to applicable cost centers in a manner consistent with the guides provided in para. V-B, on a basis that gives primary emphasis to space utilization. The allocations should be developed as follows:

a. Where actual space and related cost records are available or can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

b. Where the space and related cost records maintained are not sufficient for purposes of the foregoing, a reasonable estimate of the proportion of total space assigned to the various costs centers normally will suffice as a means for effecting distribution of the amounts involved; or

c. Where it can be demonstrated that an area or volume or space basis of allocation is impractical or inequitable, other bases may be used provided consideration is given to the use of facilities by research personnel and others, including patients.

D. *Maintenance of plant.* 1. The expenses under this heading should include:

a. All salaries and wages pertaining to ordinary repair and maintenance work performed by employees on the payroll of the hospital;

b. All supplies and parts used in the ordinary repairing and maintaining of buildings and general equipment; and

c. Amounts paid to outside concerns for the ordinary repairing and maintaining of buildings and general equipment.

2. The expenses included in this category should be allocated to applicable cost centers in a manner consistent with the guides provided in para. V-B. on a basis that gives primary emphasis to space utilization. The

allocations and apportionments should be developed as follows:

a. Where actual space and related cost records are available and can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

b. Where the space and related cost records maintained are not sufficient for purposes of the foregoing, a reasonable estimate of the proportion of total space assigned to the various cost centers normally will suffice as a means for effecting distribution of the amounts involved; or

c. Where it can be demonstrated that an area or volume of space basis of allocation is impractical or inequitable, other basis may be used provided consideration is given to the use of facilities by research personnel and others, including patients.

E. *Laundry and linen.* 1. The expenses under this heading should include:

a. Salaries and wages of laundry department employees, seamstresses, clean linen handlers, linen delivery men, etc.;

b. Supplies used in connection with the laundry operation and all linens purchased; and

c. Amounts paid to outside concerns for purchased laundry and/or linen service.

2. The expense included in this category should be allocated to related cost centers in a manner consistent with the guides provided in para. V-B. on a basis that gives primary emphasis to actual pounds of linen used. The allocations should be developed as follows:

a. Where actual poundage and related cost records are available or can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

b. Where it can be demonstrated that a poundage basis of allocation is impractical or inequitable other bases may be used provided consideration is given to the use of linen by research personnel and others, including patients.

F. *Housekeeping.* 1. The expenses under this heading should include:

a. All salaries and wages of the department head, foreman, maids, porters, janitors, wall washers, and other housekeeping employees;

b. All supplies used in carrying out the housekeeping functions; and

c. Amounts paid to outside concerns for purchased services such as window washing, insect extermination, etc.

2. The expenses included in this category should be allocated to related cost centers in a manner consistent with the guides provided in para. V-B. on a basis that gives primary emphasis to space actually serviced by the housekeeping department. The allocations and apportionments should be developed as follows:

a. Where actual space serviced and related cost records are available or can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

b. Where the space serviced and related cost records maintained are not sufficient for purposes of the foregoing, a reasonable estimate of the proportion of total space assigned to the various cost centers normally will suffice as a means for effecting distribution of the amounts of housekeeping expenses involved; or

c. Where it can be demonstrated that the space serviced basis of allocation is impractical or inequitable, other bases may be used provided consideration is given to the use of housekeeping services by research personnel and others, including patients.

G. *Dietary.* 1. These expenses, as used herein, shall mean only the subsidy provided by the hospital to its employees including research personnel through its cafeteria operation. The hospital must be able to demonstrate through the use of proper cost accounting techniques that the cafeteria operates at a loss to the benefit of employees.

2. The reasonable operating loss of a subsidized cafeteria operation should be allocated to related cost centers in a manner consistent with the guides provided in para. V-B. on a basis that gives primary emphasis to number of employees.

H. *Maintenance (housing) of personnel.* 1. The expenses under this heading should include:

a. The salaries and wages of matrons, clerks, and other employees engaged in work in nurses' residences and other employees' quarters;

b. All supplies used in connection with the operation of such dormitories; and

c. Payments to outside agencies for the rental of houses, apartments, or rooms used by hospital personnel.

2. The expenses included in this category should be allocated to related cost centers in a manner consistent with the guides provided in para. V-B. on a basis that gives primary emphasis to employee utilization of housing facilities. The allocation should be developed as follows:

a. Appropriate credit should be given for all payments received from employees or otherwise to reduce the expense to be allocated;

b. A net cost per housed employee may then be computed; and

c. Allocation should be made on a departmental basis based on the number of housed employees in each respective department.

I. *Medical records and library.* 1. The expenses under this heading should include:

a. The salaries and wages of the records librarian, medical librarian, clerks, stenographers, etc.; and

b. All supplies such as medical record forms, chart covers, filing supplies, stationery, medical library books, periodicals, etc.

2. The expenses included in this category should be allocated to related cost centers in a manner consistent with the guides provided in para. V-B. on a basis that gives primary emphasis to a special time survey of medical records personnel. If this appears to be impractical or inequitable, other bases may be used provided consideration is given to the use of these facilities by research personnel and others, including patients.

VII. DETERMINATION AND APPLICATION OF INDIRECT COST RATE OR RATES

A. *Indirect cost pools.* 1. Subject to (2) below, indirect costs allocated to organized research should be treated as a common pool, and the costs in such common pool should be distributed to individual research agreements benefiting therefrom on a single rate basis.

2. In some instances a single rate basis for use on all government research at a hospital may not be appropriate since it would not take into account those different environmental factors which may affect substantially the indirect costs applicable to a particular segment of government research at the institution. For this purpose, a particular segment of government research may be that performed under a single research agreement or it may consist of research under a group of research agreements performed in a common environment. The environmental factors are not limited to the physical location of the work. Other important factors are the level of the administrative support required, the nature of the facilities or other resources employed, the scientific disciplines or technical skills involved, the organizational arrangements used, or any combination thereof. Where a particular segment of government research is performed within an environment which appears to generate a significantly different level of indirect costs, provision should be made for a separate indirect cost pool applicable to such work. An example of this differential may be in the development of a separate indirect cost pool for a clinical research center grant. The separate indirect cost pool should be developed during the course of the regular distribution process, and the separate indirect cost rate resulting therefrom should be utilized provided it is determined that:

a. Such indirect cost rate differs significantly from that which would have obtained under (1) above; and

b. The volume of research work to which such rate would apply is material in relation to other government research at the institution.

3. It is a common practice for grants or contracts awarded to other institutions, typically University Schools of Medicine, to be performed on hospital premises. In these cases the hospital should develop a separate indirect cost pool applicable to the work under such grants or contracts. This pool should be developed by a selective distribution of only those indirect cost categories which benefit the work performed by the other institution, within the practical limits dictated by available data and the materiality of the amounts involved. Hospital costs determined to be allocable to grants or contracts awarded to another institution may not be recovered as a cost of grants or contracts awarded directly to the hospital.

B. *The distribution base.* Preferably, indirect costs allocated to organized research should be distributed to applicable research agreements on the basis of direct salaries and wages. However, where the use of salaries and wages results in an inequitable allocation of costs to the research agreements, total direct costs or a variation thereof, may be used in lieu of salaries and wages. Regardless of the base used, an indirect cost rate should be determined for each of the separate indirect cost pools developed pursuant to para. VII-A. The rate in each case should be stated as the percentage which the amount of the particular indirect cost pool is of the total direct salaries and wages (or other base selected) for all research agreements identified with such a pool.

C. *Negotiated lump sum for overhead.* A negotiated fixed amount in lieu of indirect costs may be appropriate for self-contained or off-campus research activities where the benefits derived from a hospital's indirect services cannot be readily determined. Such amount negotiated in lieu of indirect costs will be treated as an offset to the appropriate indirect cost pool after allocation to patient care, organized research, instruction and training, and other hospital activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

D. *Predetermined overhead rates.* The utilization of predetermined fixed overhead rates may offer potential advantages in the administration of research agreements by facilitating the preparation of research budgets and permitting more expeditious close out of the agreements when the work is completed. Therefore, to the extent allowed by law, consideration may be given to the negotiation of predetermined fixed rates in those situations where the cost experience and other pertinent factors available are deemed sufficient to enable the Government and the hospital to reach a reasonable conclusion as to the probable level of the indirect cost rate for the ensuing accounting period.

VIII. SIMPLIFIED METHOD FOR SMALL INSTITUTIONS

A. *General.* 1. Where the total direct cost of all government-sponsored research and development work at a hospital in a year is minimal, the use of the abbreviated procedure described in para. VIII-B below may be acceptable in the determination of allowable indirect costs. This method may also be used to initially determine a provisional indirect cost rate for hospitals that have not previously established a rate. Under this abbreviated procedure, data taken directly from the institution's most recent annual financial report and immediately available supporting information will be utilized as a basis for determining the indirect cost rate applicable to research agreements at the institution.

2. The rigid formula approach provided under the abbreviated procedure has limitations which may preclude its use at some hospitals either because the minimum data required for this purpose are not readily available or because the application of the abbreviated procedure to the available data produces results which appear inequitable to the Government or the hospital. In any such case, indirect costs should be determined through use of the regular procedure rather than the abbreviated procedure.

3. In certain instances where the total direct cost of all government-sponsored research and development work at the hospital is more than minimal, the abbreviated procedure may be used if prior permission is obtained. This alternative will be granted only in those cases where it can be demonstrated that the step-down technique cannot be followed.

B. *Abbreviated procedure.* 1. Total expenditures as taken from the most recent annual financial report will be adjusted by eliminating from further consideration expenditures for capital items as defined in para. IX-B.4 and unallowable costs as defined under various headings in para. IX and para. III-E.

2. Total expenditures as adjusted under the foregoing will then be distributed among (a) expenditures applicable to administrative and general overhead functions, (b) expenditures applicable to all other overhead functions, and (c) expenditures for all other purposes. The first group shall include amounts associated with the functional categories, Administration and General, and Dietary, as defined in para. VI. The second group shall include Depreciation, Operation of Plant, Maintenance of Plant, and Housekeeping. The third group—expenditures for all other purposes—shall include the amounts applicable to all other activities, namely, patient care, organized research, instruction and training, and other hospital activities as defined under para. II-E. For the purposes of this section, the functional categories of Laundry and Linen, Maintenance of Personnel, and Medical Records and Library as defined in para. VI shall be considered as expenditures for all other purposes.

3. The expenditures distributed to the first two groups in para. VIII-B.2 should then be adjusted by those receipts or negative expenditure types of transactions which tend to reduce expense items allocable to research agreements as indirect costs. Examples of such receipts or negative expenditures are itemized in para. III-E.1.

4. In applying the procedures in para. VIII-B.1 and B.2, the cost of unallowable activities such as Gift Shop, Investment Property Management, Fund Raising, and Public Relations, when they benefit from the hospital's indirect cost services, should be treated as expenditures for all other purposes. Such activities are presumed to benefit from the hospital's indirect cost services when they include salaries of personnel working in the hospital. When they do not include such salaries, they should be eliminated from the indirect cost rate computation.

5. The indirect cost rate will then be computed in two stages. The first stage requires the computation of an Administrative and General rate component. This is done by applying a ratio of research direct costs over total direct costs to the Administrative and General pool developed under para. VIII-B.2 and B.3 above. The resultant amount—that which is allocable to research—is divided by the direct research cost base. The second stage requires the computation of an All other Indirect Cost rate component. This is done by applying a ratio of research direct space over total direct space to All Other Indirect Cost pool developed under para. VIII-B.2 and B.3 above. The resultant amount—that which is allocable to research—is divided by the direct research cost base.

The total of the two rate components will be the institution's indirect cost rate. For the purposes of this section, the research direct cost or space and total direct cost or space will be that cost or space identified with the functional categories classified under Expenditures for all other purposes under para. VIII-B.2.

IX. GENERAL STANDARDS FOR SELECTED ITEMS OF COST

A. *General.* This section provides standards to be applied in establishing the allowability of certain items involved in determining cost. These standards should apply irrespective of whether a particular item of cost is properly treated as direct cost or indirect cost. Failure to mention a particular item of cost in the standards is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment or standards provided for similar or related items of cost. In case of discrepancy between the provisions of a specific research agreement and the applicable standards provided, the provisions of the research agreement should govern. However, in some cases advance understandings should be reached on particular cost items in order that the full costs of research be supported. The extent of allowability of the selected items of cost covered in this section has been stated to apply broadly to many accounting systems in varying environmental situations. Thus, as to any given research agreement, the reasonableness and allocability of certain items of costs may be difficult to determine, particularly in connection with hospitals which have medical school or other affiliations. In order to avoid possible subsequent disallowance or dispute based on unreasonableness or nonallocability, it is important that prospective recipients of federal funds particularly those whose work is predominantly or substantially with the Government, seek agreement with the Government in advance of the incurrence of special or unusual costs in categories where reasonableness or allocability are difficult to determine. Such agreement may also be initiated by the Government. Any such agreement should be incorporated in the research agreement itself. However, the absence of such an advance agreement on any element of cost will not in itself serve to make that element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

1. Facilities costs, such as;

a. Depreciation

b. Rental

c. Use charges for fully depreciated assets

d. Idle facilities and idle capacity

e. Plant reconversion

f. Extraordinary or deferred maintenance and repair

g. Acquisition of automatic data processing equipment.

2. Preaward costs

3. Non-hospital professional activities

4. Self-insurance

5. Support services charged directly (computer services, printing and duplicating services, etc.)

6. Employee compensation, travel, and other personnel costs, including;

a. Compensation for personal service, including wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation

b. Morale, health, welfare, and food service and dormitory costs

c. Training and education costs

d. Relocation costs, including special or mass personnel movement

B. *Selected items.*—1. *Advertising costs.* The term advertising costs means the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television programs, direct mail, exhibits, and the like. The only advertising costs allowable are those which are solely for;

a. The recruitment of persons required for the performance by the institution of obligations arising under the research agreement, when considered in conjunction with all other recruitment costs as set forth in para IX-B.34

b. The procurement of scarce items for the performance of the research agreement; or

c. The disposal of scrap or surplus materials acquired in the performance of the research agreement.

Costs of this nature, if incurred for more than one research agreement or for both research agreement work and other work of the institution, are allowable to the extent that the principles in paragraph IV and V are observed.

2. *Bad debts.* Losses arising from uncollectible accounts and other claims and related collection and legal costs are unallowable except that a bad debt may be included as a direct cost of the research agreement to the extent that it is caused by a research patient and approved by the awarding agency. This inclusion is only intended to cover the situation of the patient admitted for research purposes who subsequently or in conjunction with the research receives clinical care for which a charge is made to the patient. If, after exhausting all means of collecting these charges, a bad debt results, it may be considered an appropriate charge to the research agreement.

3. *Bonding costs.* a. Bonding costs arise when the Government requires assurance against financial loss to itself or others by reason of the act or default of the hospital. They arise also in instances where the hospital requires similar assurance.

Included are such types as bid, performance, payment, advance payment, infringement, and fidelity bonds.

b. Costs of bonding required pursuant to the terms of the research agreement are allowable.

c. Costs of bonding required by the hospital in the general conduct of its business are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

4. *Capital expenditures.* The costs of equipment, buildings, and repairs which materially increase the value or useful life of buildings or equipment should be capitalized and are unallowable except as provided for in the research agreement.

5. *Civil defense costs.* Civil defense costs are those incurred in planning for, and the protection of life and property against the possible effects of enemy attack. Reasonable costs of civil defense measures (including costs in excess of normal plant protection costs, first-aid training and supplies, fire-fighting training, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the institution's premises pursuant to suggestions or requirements of civil defense authorities are allowable when distributed to all activities of the institution. Capital expenditures for civil defense purposes will not be allowed, but a use allowance or depreciation may be permitted in accordance with provisions set forth elsewhere. Costs of local civil defense projects not on the institution's premises are unallowable.

6. *Communication costs.* Costs incurred for telephone services, local and long distance telephone calls, telegrams, radiograms, postage, and the like are allowable.

7. *Compensation for personal services.*—a. *General.* Compensation for personal services covers all remuneration paid currently or accrued to employees of the hospital for services rendered during the period of performance under government research agreements. Such remuneration includes salaries, wages, staff benefits (see para. IX-B.10), and pension plan costs (see para. IX-B.25). The costs of such remuneration are allowable to the extent that the total compensation to individual employees is reasonable for the services rendered and conforms to the established policy of the institution consistently applied, and provided that the charges for work performed directly on government research agreements and for other work allocable as indirect costs to sponsored research are determined and supported as hereinafter provided. For non-profit, nonproprietary institutions, where federally supported programs constitute less than a preponderance of the activity at the institution the primary test of reasonableness will be to require that the institution's compensation policies be applied consistently both to federally-sponsored and non-sponsored activities alike. However, where special circumstances so dictate a contractual clause may be utilized which calls for application of the test of comparability in determining the reasonableness of compensation.

b. *Payroll distribution.* Amounts charged to organized research for personal services, regardless of whether treated as direct costs or allocated as indirect costs, will be based on hospital payrolls which have been approved and documented in accordance with generally accepted hospital practices. In order to develop necessary direct and indirect allocations of cost, supplementary data on time or effort as provided in (c) below, normally need be required only for individuals whose compensation is properly chargeable to two or more research agreements or to two or more of the following broad functional categories: (1) patient care; (2) organized research; (3) instruction and training; (4) indirect activities as defined in para. V-A; or (5) other hospital activities as defined in para. II-E.

c. *Reporting time or effort.* Charges for salaries and wages of individuals other than members of the professional staff will be supported by daily time and attendance and payroll distribution records. For members of the professional staff, current and reasonable estimates of the percentage distribution of their total effort may be used as support in the absence of actual time records. The term professional staff for purposes of this section includes physicians, research associates, and other personnel performing work at responsible levels of activities. These personnel normally fulfill duties, the competent performance of which usually requires persons possessing degrees from accredited institutions of higher learning and/or state licensure. In order to qualify as current and reasonable, estimates must be made no later than one month (though not necessarily a calendar month) after the month in which the services were performed.

d. *Preparation of estimates of effort.* Where required under (c) above, estimates of effort spent by a member of the professional staff on each research agreement should be prepared by the individual who performed the services or by a responsible individual such as a department head or supervisor having first-hand knowledge of the services performed on each research agreement. Estimates must show the allocation of effort between organized research and all other hospital activities in terms of the percentage of total effort devoted to each of the broad functional categories referred to in (b) above. The estimate of effort spent on a research agreement may include a reasonable amount of time spent in activities contributing and intimately related to work under the agreement, such as preparing and delivering special lectures about specific aspects of the ongoing research, writing research reports and articles, participating in appropriate research seminars, consulting with colleagues with respect to related research, and attending appropriate scientific meetings and conferences. The term "all other hospital activities" would include departmental research, administration, committee work, and public services undertaken on behalf of the hospital.

e. *Application of budget estimates.* Estimates determined before the performance of services, such as budget estimates on a monthly, quarterly, or yearly basis do not qualify as estimates of effort spent.

f. *Non-hospital professional activities.* A hospital must not alter or waive hospital-wide policies and practices dealing with the permissible extent of professional services over and above those traditionally performed without extra hospital compensation, unless such arrangements are specifically authorized by the sponsoring agency. Where hospital-wide policies do not adequately define the permissible extent of consultantships or other non-hospital activities undertaken for extra pay, the Government may require that the effort of professional staff working under research agreements be allocated as between (1) hospital activities, and (2) non-hospital professional activities. If the sponsoring agency should consider the extent of non-hospital professional effort excessive, appropriate arrangements governing compensation will be negotiated on a case by case basis.

g. *Salary rates for part-time appointments.* Charges for work performed on government research by staff members having only part-time appointments will be determined at a rate not in excess of that for which he is regularly paid for his part-time staff assignment.

8. *Contingency provisions.* Contributions to a contingency reserve or any similar provisions made for events the occurrence of which cannot be foretold with certainty as to time, intensity, or with an assurance of their happening, are unallowable.

9. *Depreciation and use allowances.* a. Hospitals may be compensated for the use of buildings, capital improvements and usable equipment on hand through depreciation or use allowances. Depreciation is a charge to current operations which distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life has reference to the prospective period of economic usefulness in the particular hospital's operations as distinguished from physical life. Use allowances are the means of allowing compensation when depreciation or other equivalent costs are not considered.

b. Due consideration will be given to government-furnished research facilities utilized by the institution when computing use allowances and/or depreciation if the government-furnished research facilities are material in amount. Computation of the use allowance and/or depreciation will exclude both the cost or any portion of the cost of grounds, buildings and equipment borne by or donated by the Federal Government, irrespective of where title was originally vested or where it presently resides, and secondly, the cost of grounds. Capital expenditures for land improvements (paved areas, fences, streets, sidewalks, utility conduits, and similar improvements not already included in the cost of buildings) are allowable provided the systematic amortization of such capital expenditures has been provided in the institution's books of accounts, based on reasonable determinations of the probable useful lives of the individual items involved, and the share allocated to organized research is developed from the amount thus amortized for the base period involved.

c. Normal depreciation on a hospital's plant, equipment, and other capital facilities, except as excluded by (d) below, is an allowable element of research cost provided that the amount thereof is computed:

1. Upon the property cost basis used by the hospital for Federal Income Tax purposes (See section 167 of the Internal Revenue Code of 1954); or

2. In the case of non-profit or tax exempt organizations, upon a property cost basis which could have been used by the hospital for Federal Income Tax purposes, had such hospital been subject to the payment of income tax; and in either case

3. By the consistent application to the assets concerned of any generally accepted accounting method, and subject to the limitations of the Internal Revenue Code of 1954 as amended, including—

i. The straight line method;

ii. The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in (i) above;

iii. The sum of the years-digits method; and

iv. Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not during the first two-thirds of the useful life of the property exceed the total of such allowances which would have been used had such allowances been computed under the method described in (ii) above.

d. Where the depreciation method is followed, adequate property records must be maintained. The period of useful service (service life) established in each case for usable capital assets must be determined on a realistic basis which takes into consideration such factors as type of construction, nature of the equipment used, technological developments in the particular research area, and the renewal and replacement policies followed for the individual items or classes of assets involved. Where the depreciation method is introduced for application to assets acquired in prior years, the annual charges therefrom must not exceed the amounts that would have resulted had the depreciation method been in effect from the date of acquisition of such assets.

e. Depreciation on idle or excess facilities shall not be allowed except on such facilities as are reasonably necessary for standby purposes.

f. Where an institution elects to go on a depreciation basis for a particular class of assets, no depreciation, rental or use charge may be allowed on any such assets that would be viewed as fully depreciated; provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the actual replacement policy followed in the light of service lives used for calculating depreciation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

g. Hospitals which choose a depreciation allowance for assets purchased prior to 1966 based on a percentage of operating costs in lieu of normal depreciation for purposes of reimbursement under Public Law 89-97 (Medicare) shall utilize that method for determining depreciation applicable to organized research.

The operating costs to be used are the lower of the hospital's 1965 operating costs or the hospital's current year's allowable costs. The percent to be applied is 5 percent starting with the year 1966-67, with such percentage being uniformity reduced by one-half percent each succeeding year. The allowance based on operating costs is in addition to regular depreciation on assets acquired after 1965. However, the combined amount of such allowance on pre-1966 assets and the allowance for actual depreciation on assets acquired after 1965 may not exceed 6 percent of the hospital's allowable cost for the current year. After total depreciation has been computed, allocation methods are used to determine the share attributable to organized research.

For purposes of this section, "Operating Costs" means the total costs incurred by the hospital in operating the institution, and includes patient care, research, and other activities. "Allowable Costs" means operating costs less unallowable costs as defined in these principles; by the application of allocation methods to the total amount of such allowable costs, the share attributable to Federally-sponsored research is determined.

A hospital which elects to use this procedure under Public Law 89-97 and subsequently changes to an actual depreciation basis on pre-1966 assets in accordance with the option afforded under the Medicare program shall simultaneously change to an actual depreciation basis for organized research.

Where the hospital desires to change to actual depreciation but either has no historical cost records or has incomplete records, the determination of historical cost could be made through appropriate means involving expert consultation with the determination being subject to review and approval by the Department of Health and Human Services.

h. Where the use allowance method is followed, the use allowance for buildings and improvements will be computed at an annual rate not exceeding two percent of acquisition cost. The use allowance for equipment will be computed at an annual rate not exceeding six and two-thirds percent of acquisition cost of usable equipment in those cases where the institution maintains current records with respect to such equipment on hand. Where the institution's records reflect only the cost (actual or estimated) of the original complement of equipment, the use allowance will be computed at an annual rate not exceeding ten percent of such cost. Original complement for this purpose means the complement of equipment initially placed in buildings to perform the functions currently being performed in such buildings; however, where a permanent change in the function of a building takes place, a redetermination of the original complement of equipment may be made at that time to establish a new original complement. In those cases where no equipment records are maintained, the institution will justify a reasonable estimate of the acquisition cost of usable equipment which may be used to compute the use allowance at an annual rate not exceeding six and two-thirds percent of such estimate.

i. Depreciation and/or use charges should usually be allocated to research and other activities as an indirect cost.

10. *Employee morale, health, and welfare costs and credits.* The costs of house publications, health or first-aid benefits, recreational activities, employees' counseling services, and other expenses incurred in accordance wtih the hospital's established practice or custom for the improvement of working conditions, employer-employee relations, employee morale, and employee performance, are allowable. Such costs will be equitably apportioned to all activities of the hospital. Income generated from any of these activities will be credited to the cost thereof unless such income has been irrevocably set over to employee welfare organizations.

11. *Entertainment costs.* Except as pertains to 10 above, costs incurred for amusement, social activities, entertainment, and any items relating thereto, such as meals, lodging, rentals, transportation, and gratuities are unallowable.

12. *Equipment and other facilities.* The cost of equipment or other facilities are allowable on a direct charge basis where such purchases are approved by the sponsoring agency concerned or provided for by the terms of the research agreement.

13. *Fines and penalties.* Costs resulting from violations of, or failure of the institution to comply with federal, state and local laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the research agreement, or instructions in writing from the awarding agency.

14. *Insurance and indemnification.* a. Costs of insurance required or approved and maintained pursuant to the research agreement are allowable.

b. Costs of other insurance maintained by the hospital in connection with the general conduct of its activities are allowable subject to the following limitations: (1) types and extent and cost of coverage must be in accordance with sound institutional practice; (2) costs of insurance or of any contributions to any reserve covering the risk of loss of or damage to government owned property are unallowable except to the extent that the Government has specifically required or approved such costs; and (3) costs of insurance on the lives of officers or trustees are unallowable except where such insurance is part of an employee plan which is not unduly restricted.

c. Contributions to a reserve for an approved self-insurance program are allowable to the extent that the types of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks. Such contributions are subject to prior approval of the Government.

d. Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the research agreement, except that costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice as well as minor losses not covered by insurance such as spoilage, breakage and disappearance of small hand tools which occur in the ordinary course of operations are allowable.

15. *Interest, fund raising and investment management costs.* a. Costs incurred for interest on borrowed capital or temporary use of endowment funds, however represented, are unallowable.

b. Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contributions are not allowable.

c. Costs of investment counsel and staff and similar expenses incurred solely to enhance income from investments are not allowable.

d. Costs related to the physical custody and control of monies and securities are allowable.

16. *Labor relations costs.* Costs incurred in maintaining satisfactory relations between the hospital and its employees, including costs of labor management committees, employees' publications, and other related activities are allowable.

17. *Losses on research agreements or contracts.* Any excess of costs over income under any agreement or contract of any nature is unallowable. This includes, but is not limited to, the hospital's contributed portion by reason of cost-sharing agreements, under-recoveries through negotiation of flat amounts for overhead, or legal or administrative limitations.

18. *Maintenance and repair costs.* a. Costs necessary for the upkeep of property (including government property unless otherwise provided for), which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are to be treated as follows:

1. Normal maintenance and repair costs are allowable;

2. Extraordinary maintenance and repair costs are allowable, provided they are allocated to the periods to which applicable for purposes of determining research costs.

b. Expenditures for plant and equipment, including rehabilitation thereof, which according to generally accepted accounting principles as applied under the hospital's established policy, should be capitalized and subjected to depreciation, are allowable only on a depreciation basis.

19. *Material costs.* Costs incurred for purchased materials, supplies and fabricated parts directly or indirectly related to the research agreement, are allowable. Purchases made specifically for the research agreement should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the institution. Withdrawals from general stores or stockrooms should be charged at their cost under any recognized method of pricing stores withdrawals conforming to sound accounting practices consistently followed by the hospital. Incoming transportation charges are a proper part of material cost. Direct material cost should include only the materials and supplies actually used for the performance

of the research agreement, and due credit should be given for any excess materials retained or returned to vendors. Due credit should be given for all proceeds or value received for any scrap resulting from work under the research agreement. Where government donated or furnished material is used in performing the research agreement, such material will be used without charge.

20. *Memberships, subscriptions and professional activity costs.* a. Costs of the hospital's membership in civic, business, technical and professional organizations are allowable.

b. Costs of the hospital's subscriptions to civic, business, professional and technical periodicals are allowable.

c. Costs of meetings and conferences, when the primary purpose is the dissemination of technical information, are allowable. This includes costs of meals, transportation, rental of facilities, and other items incidental to such meetings or conferences.

21. *Organization costs.* Expenditures such as incorporation fees, attorneys' fees, accountants' fees, brokers' fees, fees to promoters and organizers in connection with (a) organization or reorganization of a hospital, or (b) raising capital, are unallowable.

22. *Other business expenses.* Included in this item are such recurring expenses as registry and transfer charges resulting from changes in ownership of securities issued by the hospital, cost of shareholders meetings preparation and publication of reports to shareholders, preparation and submission of required reports and forms to taxing and other regulatory bodies, and incidental costs of directors and committee meetings. The above and similar costs are allowable when allocated on an equitable basis.

23. *Patient care.* The cost of routine and ancillary or special services to research patients is an allowable direct cost of research agreements.

a. Routine services shall include the costs of the regular room, dietary and nursing services, minor medical and surgical supplies and the use of equipment and facilities for which a separate charge is not customarily made.

b. Ancillary or special services are the services for which charges are customarily made in addition to routine services, such as operating rooms, anesthesia, laboratory, BMR-EKG, etc.

c. Patient care, whether expressed as a rate or an amount, shall be computed in a manner consistent with the procedures used to determine reimbursable costs under Public Law 89–97 (Medicare Program) as defined under the "Principles Of Reimbursement For Provider Costs" published by the Social Security Administration of the Department of Health and Human Services. The allowability of specific categories of cost shall be in accordance with those principles rather than the principles for research contained herein. In the absence of participation in the Medicare program by a hospital, all references to the Medicare program in these principles shall be construed as meaning the Medicaid program.

i. Once costs have been recognized as allowable, the indirect costs or general service center's cost shall be allocated (stepped-down) to special service centers, and all patient and nonpatient costs centers based upon actual services received or benefiting these centers.

ii. After allocation, routine and ancillary costs shall be apportioned to scatter-bed research patients on the same basis as is used to apportion costs to Medicare patients, i.e. using either the departmental method or the combination method, as those methods are defined by the Social Security Administration; except that final settlement shall be on a grant-by-grant basis. However, to the extent that the Social Security Administration has recognized any other method of cost apportionment, that method generally shall also be recognized as applicable to the determination of research patient care costs.

iii. A cost center must be established on Medicare reimbursement forms for each discrete-bed unit grant award received by a hospital. Routine costs should be stepped-down to this line item(s) in the normal course of stepping-down costs under Medicare/Medicaid requirements. However, in stepping-down routine costs, consideration must be given to preventing a step-down of those costs to discrete-bed unit line items that have already been paid for directly by the grant, such as bedside nursing costs. Ancillary costs allocable to research discrete-bed units shall be determined and proposed in accordance with Section 23.c.ii.

d. Where federally sponsored research programs provide specifically for the direct reimbursement of nursing, dietary, and other services, appropriate adjustment must be made to patient care costs to preclude duplication and/or misallocation of costs.

24. *Patent costs.* Costs of preparing disclosures, reports and other documents required by the research agreement and of searching the art to the extent necessary to make such invention disclosures are allowable. In accordance with the clauses of the research agreement relating to patents, costs of preparing documents and any other patent costs, in connection with the filing of a patent application where title is conveyed to the Government, are allowable. (See also para. IX–B.36.)

25. *Pension plan costs.* Costs of the hospital's pension plan which are incurred in accordance with the established policies of the institution are allowable, provided such policies meet the test of reasonableness and the

methods of cost allocation are not discriminatory, and provided appropriate adjustments are made for credits or gains arising out of normal and abnormal employee turnover or any other contingencies that can result in forfeitures by employees which inure to the benefit of the hospital.

26. *Plan security costs.* Necessary expenses incurred to comply with government security requirements including wages, uniforms and equipment of personnel engaged in plant protection are allowable.

27. *Preresearch agreement costs.* Costs incurred prior to the effective date of the research agreement, whether or not they would have been allowable thereunder if incurred after such date, are unallowable unless specifically set forth and identified in the research agreement.

28. *Professional services costs.* a. Costs of professional services rendered by the members of a particular profession who are not employees of the hospital are allowable subject to (b) and (c) below when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government. Retainer fees to be allowable must be reasonably supported by evidence of services rendered.

b. Factors to be considered in determining the allowability of costs in a particular case include (1) the past pattern of such costs, particularly in the years prior to the award of government research agreements on the institution's total activity; (2) the nature and scope of managerial services expected of the institution's own organizations; and (3) whether the proportion of government work to the hospital's total activity is such as to influence the institution in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under government research agreements.

c. Costs of legal, accounting and consulting services, and related costs incurred in connection with organization and reorganization or the prosecution of claims against the Government are unallowable. Costs of legal, accounting and consulting services, and related costs incurred in connection with patent infringement litigation are unallowable unless otherwise provided for in the research agreement.

29. *Profits and losses on disposition of plant equipment, or other assets.* Profits or losses of any nature arising from the sale or exchange of plant, equipment, or other capital assets, including sales or exchange of either short- or long-term investments, shall be excluded in computing research agreement costs.

30. *Proposal costs.* Proposal costs are the costs of preparing bids or proposals on potential government and non-government research agreements or projects, including the development of technical data and cost data necessary to support the institution's bids or proposals. Proposal costs of the current accounting period of both successful and unsuccessful bids and proposals normally should be treated as indirect costs and allocated currently to all activities of the institution, and no proposal costs of past accounting periods will be allocable in the current period to the government research agreement. However, the institution's established practices may be to treat proposal costs by some other recognized method. Regardless of the methods used, the results obtained may be accepted only if found to be reasonable and equitable.

31. *Public information services costs.* Costs of news releases pertaining to specific research or scientific accomplishment are unallowable unless specifically authorized by the sponsoring agency.

32. *Rearrangement and alteration costs.* Costs incurred for ordinary or normal rearrangement and alteration of facilities are allowable. Special rearrangement and alteration costs incurred specifically for a project are allowable only as a direct charge when such work has been approved in advance by the sponsoring agency concerned.

33. *Reconversion costs.* Costs incurred in the restoration or rehabilitation of the institution's facilities to approximately the same condition existing immediately prior to commencement of government research agreement work, fair wear and tear excepted, are allowable.

34. *Recruiting costs.* a. Subject to (b), (c), and (d) below, and provided that the size of the staff recruited and maintained is in keeping with workload requirements, costs of "help wanted" advertising, operating costs of an employment office necessary to secure and maintain an adequate staff, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocation costs incurred incident to recruitment of new employees are allowable to the extent that such costs are incurred pursuant to a well managed recruitment program. Where an institution uses employment agencies, costs not in excess of standard commercial rates for such services are allowable.

b. In publications, costs of help wanted advertising that includes color, includes advertising material for other than recruitment purposes, or is excessive in size (taking into consideration recruitment purposes for which intended and normal institutional practices in this respect) are unallowable.

c. Costs of help wanted advertising, special emoluments; fringe benefits, and salary allowances incurred to attract professional personnel from other institutions that do not meet the test of reasonableness or do not conform with the established practices of the institution are unallowable.

d. Where relocation costs incurred incident to recruitment of a new employee have been allowed either as an allocable direct or indirect cost, and the newly hired employee resigns for reasons within his control within twelve months after hire, the institution will be required to refund or credit such relocations costs as were charged to the Government.

35. *Rental costs (including sale and leaseback of facilities).* a. Rental costs of land, building, and equipment and other personal property are allowable if the rates are reasonable in light of such factors as rental costs of comparable facilities and market conditions in the area, the type, life expectancy, condition, and value of the facilities leased, options available, and other provisions of the rental agreement. Application of these factors, in situations where rentals are extensively used, may involve among other considerations comparison of rental costs with the amount which the hospital would have received had it owned the facilities.

b. Charges in the nature of rent between organizations having a legal or other affiliation or arrangement such as hospitals, medical schools, foundations, etc., are allowable to the extent such charges do not exceed the normal costs of ownership such as depreciation, taxes, insurance, and maintenance, provided that no part of such costs shall duplicate any other allowed costs.

c. Unless otherwise specifically provided in the agreement, rental costs specified in sale and lease-back agreements incurred by hospitals through selling plant facilities to investment organizations such as insurance companies or to private investors, and concurrently leasing back the same facilities are allowable only to the extent that such rentals do not exceed the amount which the hospital would have received had it retained legal title to the facilities.

36. *Royalties and other costs for use of patents.* Royalties on a patent or amortization of the cost of acquiring a patent or invention or rights thereto necessary for the proper performance of the research agreement and applicable to tasks or processes thereunder are allowable unless the Government has a license or the right to free use of the patent, the patent has been adjudicated to be invalid, or has been administratively determined to be invalid, the patent is considered to be unenforceable, or the patent has expired.

37. *Severance pay.* a. Severance pay is compensation in addition to regular salaries and wages which is paid by a hospital to employees whose services are being terminated. Costs of severance pay are allowable only to the extent that such payments are required by law, by employer-employee agreement, by established policy that constitutes in effect an implied agreement on the institution's part, or by circumstances of the particular employment.

b. Severance payments that are due to normal, recurring turnover, and which otherwise meet the conditions of (a) above may be allowed provided the actual costs of such severance payments are regarded as expenses applicable to the current fiscal year and are equitably distributed among the institution's activities during that period.

c. Severance payments that are due to abnormal or mass terminations are of such conjectural nature that allowability must be determined on a case-by-case basis. However, the Government recognizes its obligation to participate to the extent of its fair share in any specific payment.

38. *Specialized service facilities operated by a hospital.* a. The costs of institutional services involving the use of highly complex and specialized facilities such as electronic computers and reactors are allowable provided the charges therefor meet the conditions of (b) or (c) below, and otherwise take into account any items of income or federal financing that qualify as applicable credits under para. III-E.

b. The costs of such hospital services normally will be charged directly to applicable research agreements based on actual usage or occupancy of the facilities at rates that (1) are designed to recover only actual costs of providing such services, and (2) are applied on a nondiscriminatory basis as between organized research and other work of the hospital including commercial or accommodation sales and usage by the hospital for internal purposes. This would include use of such facilities as radiology, laboratories, maintenance men used for a special purpose, medical art, photography, etc.

c. In the absence of an acceptable arrangement for direct costing as provided in (b) above, the costs incurred for such institutional services may be assigned to research agreements as indirect costs, provided the methods used achieve substantially the same results. Such arrangements should be worked out in coordination with all government users of the facilities in order to assure equitable distribution of the indirect costs.

39. *Special administrative costs.* Costs incurred for general public relations activities, catalogs, alumni activities, and similar services are unallowable.

40. *Staff and/or employee benefits.* a. Staff and/or employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job such as for annual leave, sick leave, military leave and the like are allowable provided such costs are absorbed by all hospital activities including organized research

in proportion to the relative amount of time or effort actually devoted to each.

b. Staff benefits in the form of employer contributions or expenses for Social Security taxes, employee insurance, Workmen's Compensation insurance, the Pension Plan (see para. IX-B.25), hospital costs or remission of hospital charges to the extent of costs for individual employees or their families, and the like are allowable provided such benefits are granted in accordance with established hospital policies, and provided such contributions and other expenses whether treated as indirect costs or an increment of direct labor costs are distributed to particular research agreements and other activities in a manner consistent with the pattern of benefits accruing to the individuals or groups of employees whose salaries and wages are chargeable to such research agreements and other activities.

41. *Taxes.* a. In general, taxes which the hospital is required to pay and which are paid or accrued in accordance with generally accepted accounting principles, and payments made to local governments in lieu of taxes which are commensurate with the local government services received are allowable except for (1) taxes from which exemptions are available to the hospital directly or which are available to the hospital based on an exemption afforded the Government and in the latter case when the sponsoring agency makes available the necessary exemption certificates, (2) special assessments on land which represent capital improvements, and (3) Federal Income Taxes.

b. Any refund of taxes, interest, or penalties, and any payment to the hospital of interest thereon attributable to taxes, interest or penalties, which were allowed as research agreement costs will be credited or paid to the Government in the manner directed by the Government provided any interest actually paid or credited to a hospital incident to a refund of tax, interest, and penalty will be paid or credited to the Government only to the extent that such interest accrued over the period during which the hospital had been reimbursed by the Government for the taxes, interest, and penalties.

42. *Transportation costs.* Costs incurred for inbound freight, express, cartage, postage and other transportation services relating either to goods purchased, in process, or delivered are allowable. When such costs can readily be identified with the items involved, they may be charged directly as transportation costs or added to the cost of such items. Where identification with the material received cannot readily be made, inbound transportation costs may be charged to the appropriate indirect cost accounts if the institution follows a consistent equitable procedure in this respect. Outbound freight, if reimbursable under the terms of the research agreement, should be treated as a direct cost.

43. *Travel costs.* a. Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the hospital. Such costs may be charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed by the institution in its regular operations.

b. Travel costs are allowable subject to (c) and (d) below when they are directly attributable to specific work under a research agreement or when they are incurred in the normal course of administration of the hospital or a department or research program thereof.

c. The difference in cost between first class air accommodations and less than first class air accommodations is unallowable except when less than first class air accommodations are not reasonably available to meet necessary mission requirements such as where less than first class accommodations would (1) require circuitous routing, (2) require travel during unreasonable hours, (3) greatly increase the duration of the flight, (4) result in additional costs which would offset the transportation savings, or (5) offer accommodations which are not reasonably adequate for the medical needs of the traveler.

d. Costs of personnel movements of a special or mass nature are allowable only when authorized or approved in writing by the sponsoring agency or its authorized representative.

44. *Termination costs applicable to contracts.* a. Contract terminations generally give rise to the incurrence of costs or to the need for special treatment of costs which would not have arisen had the contract not been terminated. Items peculiar to termination are set forth below. They are to be used in conjunction with all other provisions of these principles in the case of contract termination.

b. The cost of common items of material reasonably usable on the hospital's other work will not be allowable unless the hospital submits evidence that it could not retain such items at cost without sustaining a loss. In deciding whether such items are reasonably usable on other work of the institution, consideration should be given to the hospital's plans for current scheduled work or activities including other research agreements. Contemporaneous purchases of common items by the hospital will be regarded as evidence that such items are reasonably usable on the hospital's other work. Any acceptance of common items as allowable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirement of other work.

c. If in a particular case, despite all reasonable efforts by the hospital, certain costs cannot be discontinued immediately after the effective date of termination, such costs are generally allowable within the limitations set forth in these principles, except that any such costs continuing after termination due to the negligent or willful failure of the hospital to discontinue such costs will be considered unacceptable.

d. Loss of useful value of special tooling and special machinery and equipment is generally allowable, provided (1) such special tooling, machinery or equipment is not reasonably capable of use in the other work of the hospital; (2) the interest of the Government is protected by transfer of title or by other means deemed appropriate by the contracting officer; and (3) the loss of useful value as to any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other government contracts for which the special tooling, special machinery or equipment was acquired.

e. Rental costs under unexpired leases are generally allowable where clearly shown to have been reasonably necessary for the performance of the terminated contract, less the residual value of such leases, if (1) the amount of such rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and (2) the hospital makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease. There also may be included the cost of alterations of such leased property, provided such alterations were necessary for the performance of the contract and of reasonable restoration required by the provisions of the lease.

f. Settlement expenses including the following are generally allowable: (1) accounting, legal, clerical, and similar costs reasonably necessary for the preparation and presentation to contracting officers of settlement claims and supporting data with respect to the terminated portion of the contract and the termination and settlement of subcontracts; and (2) reasonable costs for the storage, transportation, protection, and disposition of property provided by the Government or acquired or produced by the institution for the contract.

g. Subcontractor claims including the allocable portion of claims which are common to the contract and to other work of the contractor are generally allowable.

45. *Voluntary services.* The value of voluntary services provided by sisters or other members of religious orders is allowable provided that amounts do not exceed that paid other employees for similar work. Such amounts must be identifiable in the records of the hospital as a legal obligation of the hospital. This may be reflected by an agreement between the religious order and the hospital supported by evidence of payments to the order.

[45 FR 22610, Apr. 3, 1980]

APPENDIX F—[RESERVED]

APPENDIX G—ATTACHMENT O, "PROCUREMENT STANDARDS," OF OMB CIRCULAR A-102, "UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS-IN-AID TO STATE AND LOCAL GOVERNMENTS"

1. *Applicability.*

a. This Attachment establishes standards and guidelines for the procurement of supplies, equipment, construction, and services for Federal assistance programs. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and Executive orders.

b. No additional procurement requirements or subordinate regulations shall be imposed upon grantees by Executive agencies unless specifically required by Federal law or Executive orders or authorized by the Administrator for Federal Procurement Policy. This prohibition is not applicable to payment conditions issued in accordance with Treasury Circular 1075, individual grantee requirements pursuant to section 10 of the basic circular[1] or the provisions of this or other OMB circulars.

c. Provisions of current subordinate requirements not conforming to this attachment shall be rescinded by grantor agencies unless approved by the Office of Federal Procurement Policy (OFPP).

2. *Grantee/Grantor Responsibility.*

a. These standards do not relieve the grantee of any contractual responsibilities under its contracts. The grantee is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered into in support of a grant. These include but are not limited to: source evaluation, protests, disputes, and claims. Executive agencies shall not substitute their judgment for that of the grantee unless the matter is primarily a Federal concern. Violations of law are to be referred to the local, State, or Federal authority having proper jurisdiction.

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[1] For HHS grants and subgrants, the requirements referred to are those issued under 45 CFR 74.7, "Special grant or subgrant conditions."

b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs conform to the standards set forth in this attachment and applicable Federal law.

3. *Grantee Procurement Improvement.*

Executive agencies awarding Federal grants or other assistance which require or allow for procurement by the recipients are encouraged to assist recipients in improving their procurement capabilities by providing them with technical assistance, training, publications, and other aid.

4. *Procurement System Reviews.*

a. Executive agencies are encouraged to perform reviews of their grantees' procurement systems if a continuing relationship with the grantee is anticipated or a substantial amount of the Federal assistance is to be used for procurement and review of individual contracts is anticipated. The purpose of the review shall be to determine: (1) whether a grantee's procurement system meets the standards prescribed by this Attachment or other criteria acceptable to the OFPP, such as provisions of the model procurement code for State and local government and (2) whether the grantee's procurement system should be certified by the reviewing agency. Such a review will also give an agency an opportunity to give technical assistance to a grantee to remedy its procurement system if it does not fully comply. In addition, such a review may provide a basis for deciding whether the grantee's contracts and related procurement documents should be subject to the grantor's prior approval, as provided by Section 6.

b. In conducting procurement system reviews, grantor agencies will evaluate a grantee's procurement system in terms of whether it complies with the standards prescribed by this Attachment and represents a fair, efficient and effective procurement system. To the maximum extent feasible, reviewers will rely upon State or local evaluations and analyses performed by agencies or organizations independent of the grantee contracting activity.

c. When a Federal grantor agency completes a procurement review, it shall furnish a report to the grantee, with a copy to OFPP.

d. All agencies should normally rely upon the resultant findings or certification for a period of 24 months before another review is performed.

e. Reviews shall be conducted in accordance with standards and guidelines approved or issued by OFPP.

f. The reviews authorized by Section 6 are waived if a grantee's procurement system is certified.

5. *Protest Procedures.*

Grantor agencies may develop an administrative procedure to handle complaints or protests regarding grantee contractor selection actions. The procedure shall be limited as follows:

a. No protest shall be accepted by the grantor agency until all administrative remedies at the grantee level have been exhausted.

b. Review is limited to:

(i) Violations of Federal law or regulations. Violations of State or local law shall be under the jurisdiction of State or local authorities.

(ii) Violations of grantee's protest procedures or failure to review a complaint or protest.

6. *Grantor Review of Proposed Contracts.*

Federal grantor pre-award review and approval of the grantee's proposed contracts and related procurement documents, such as requests for proposals and invitations for bids, is permitted only under the following circumstances:

a. The procurement is expected to exceed $10,000 and is to be awarded without competition or only one bid or offer is received in response to solicitation.

b. The procurement expected to exceed $10,000 specifies a "brand name" product; or

c. The grantee's procurement procedures or operation fails to comply with one or more significant aspects of this Attachment. The grantor agency shall notify the grantee in writing, with a copy of such notification to the OFPP.

7. *Code of Conduct.*

Grantees shall maintain a written code or standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Federal funds. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

a. The employee, officer or agent;

b. Any member of his immediate family;

c. His or her partner; or

d. An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements.

Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.

8. *Procurement Procedures.*

The grantee shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by grantee officials to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidation or breaking out to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency grantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

9. *Contracting With Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms.*

a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists.

(2) Assuring that small and minority businesses are solicited whenever they are potential sources.

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.

(5) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required.[2]

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in 1 through 5 above.

b. Grantees shall take similar appropriate affirmative action in support of women's business enterprises.

c. Grantees are encouraged to procure goods and services from labor surplus areas.

d. Grantor agencies may impose additional regulations and requirements in the foregoing areas only to the extent specifically mandated by statute or presidential direction.

10. *Selection Procedures.*

a. All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this attachment. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) noncompetitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience and bonding requirements.

b. The grantee shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation, shall:

(a) incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.

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[2] Additional advice and assistance regarding the use of small or minority businesses may be obtained from the following HHS components:

Footnote continued

1. The Office of Facilities Engineering and its regional offices (for assistance in identifying minority-owned firms interested in performing construction, alteration, or renovation work).

2. The Office of Grants and Procurement.

(b) clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

11. *Method of Procurement.*

Procurement under grants shall be made by one of the following methods, as described herein: (a) small purchase procedures; (b) competitive sealed bids (formal advertising); (c) competitive negotiation; (d) noncompetitive negotiation.

a. Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than $10,000. Grantees shall comply with State or local small purchase dollar limits under $10,000. If small purchase procedures are used for a procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources.

b. In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(1) In order for formal advertising to be feasible, appropriate conditions must be present, including, as a minimum, the following:

(a) A complete, adequate and realistic specification or purchase description is available.

(b) Two or more responsible suppliers are willing and able to compete effectively for the grantee's business.

(c) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(2) If formal advertising is used for a procurement under a grant, the following requirements shall apply:

(a) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(b) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(c) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(d) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the Grantee indicates that such discounts are generally taken.

(e) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program.

c. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposals shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

(2) The request for proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.

(3) The grantee shall provide mechanisms for technical evaluation of the proposals received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award.

(4) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

(5) Grantees may utilize competitive negotiation procedures for procurement of Architectural/Engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

d. Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(1) the item is available only from a single source;

(2) public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(3) the Federal grantor agency authorizes noncompetitive negotiation; or

(4) after solicitation of a number of sources, competition is determined inadequate.

e. Additional innovative procurement methods may be used by Grantees with the approval of the Grantor Agency. A copy of such approval shall be sent to OFPP.

12. *Contract Pricing.*

The cost plus a percentage of cost and percentage of construction cost method of contracting shall not be used. Grantees shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

13. *Grantee Procurement Records.*

Grantees shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to, information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

14. *Contract Provisions.*

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal Law or the Grantor Agency.

a. Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

b. All contracts in excess of $10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

c. All contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).

d. All contracts and subgrants for *construction* or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.

e. When required by the Federal grant program legislation, all *construction* contracts in excess of $2,000 awarded by grantees and subgrantees shall include a provision for compliance with the Davis-Bacon Act (40 USC 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less often than once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The grantee shall report all suspected or reported violations to the grantor agency.

f. Where applicable, all contracts awarded by grantees and subgrantees in excess of $2,000 for *construction* contracts and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 USC 327-330) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

g. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements and regulations pertaining to copyrights and rights in data.[3]

h. All negotiated contracts (except those awarded by small purchases procedures) awarded by grantees shall include a provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.

Grantees shall require contractors to maintain all required records for three years after grantees make final payments and all other pending matters are closed.[4]

i. Contracts, subcontracts, and subgrants of amounts in excess of $100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h)), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15), which prohibit the use under nonexempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the grantor agency and to the U.S.E.P.A. Assistant Administrator for Enforcement (EN-329).

j. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-165).

Grantor Agencies are permitted to require changes, remedies, changed conditions, access and record retention and suspension of work clauses approved by the Office of Federal Procurement Policy.

15. *Contract Administration.*

Grantees shall maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

[45 FR 37668, June 3, 1980; 45 FR 38380, June 9, 1980]

APPENDIX H—ATTACHMENT O, "PROCUREMENT STANDARDS," OF OMB CIRCULAR A-110, "GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NONPROFIT ORGANIZATIONS"

1. This attachment provides standards for use by recipients in establishing procedures for the procurement of supplies, equipment construction and other services with Federal funds.[1] These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal law and executive orders. No additional procurement standards or requirements shall be imposed by the Federal sponsoring agencies upon recipients unless specifically required by Federal statute or executive orders.

2. The standards contained in this attachment do not relieve the recipient of the contractual responsibilities arising under its contracts. The recipient is the responsible authority, without recourse to the Federal sponsoring agency regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into, in support of a grant or other agreement. This includes disputes,

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[3] HHS Department-wide provisions on inventions and patents arising out of activities assisted by a grant are in 45 CFR Parts 6 and 8. Department-wide provisions on copyrights under grants and subgrants are in 45 CFR Part 74, Subpart O. Other provisions on these topics or on rights to data may be in other terms of a grant. If any contract may give rise to works, inventions, patents, or data subject to any of these provisions, the recipient shall place a requirement in the contract for contractor and subcontractor compliance with the provisions. The recipient need not place requirements of this kind in all contracts.

[4] For clarification of paragraph 14.h as it applies to HHS grants and subgrants, see 45 CFR 74.164.

[1] For the applicability of this attachment under HHS grants and subgrants, see 45 CFR 74.160 and 74.161.

claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

3. Recipients may use their own procurement policies and procedures. However, all recipients shall adhere to the standards set forth in paragraphs 3 and 4.

a. The recipient shall maintain a code or standards of conduct that shall govern the performance of its officers, employees or agents engaged in the awarding and administration of contracts using Federal funds. No employee, officer or agent shall participate in the selection, award or administration of a contract in which Federal funds are used, where, to his knowledge, he or his immediate family, partners, or organization in which he or his immediate family or partner has a financial interest or with whom he is negotiating or has any arrangement concerning prospective employment. The recipients' officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors or potential contractors. Such standards shall provide for disciplinary actions to be applied for violations of such standards by the recipients' officers, employees or agents.

b. All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient should be alert to organizational conflicts of interest or noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals should be excluded from competing for such procurements.[2] Awards shall be made to the bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the recipient, price and other factors considered. Solicitations shall clearly set forth all requirements that the bidder/offeror must fulfill in order for his bid/offer to be evaluated by the recipient. Any and all bids/offers may be rejected when it is in the recipient's interest to do so.

c. All recipients shall establish procurement procedures that provide for, at a minimum, the following procedural requirements.

(1) Proposed procurement actions shall follow a procedure to assure the avoidance of purchasing unnecessary or duplicative items. Where appropriate, an analysis shall be made of lease and purchase, alternatives to determine which would be the most economical, practical procurement.

(2) Solicitations for goods and services shall be based upon a clear and accurate description of the technical requirements for the material, product or service to be procured. Such a description shall not, in competitive procurements, contain features which unduly restrict competition. "Brand name or equal" descriptions may be used as a means to define the performance or other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by bidders/offerors shall be clearly specified.

(3) Positive efforts shall be made by the recipients to utilize small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for contracts utilizing Federal funds.[3]

(4) The type of procuring instruments used, e.g., fixed price contracts, cost reimbursable contracts, purchase orders, incentive contracts, shall be determined by the recipient but must be appropriate for the particular procurement and for promoting the best interest of the program involved. The "cost-plus-a-percentage-of-cost" method of contracting shall not be used.

(5) Contracts shall be made only with responsible contractors who possess the potentional ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources.

(6) All proposed sole source contracts or where only one bid or proposal is received in which the aggregate expenditure is expected to exceed $5,000 shall be subject to prior

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[2] HHS granting agencies have been authorized by OMB to waive this requirement for a particular procurement upon request of the recipient making the procurement.

[3] Advice and assistance regarding the use of small or minority businesses may be obtained from the following organizations:

1. The Small Business Administration and its field offices.

2. The Office of Minority Business Enterprise, Department of Commerce.

3. The Community Services Administration.

4. The Office of Facilities Engineering, HHS, and its regional offices (for assistance in identifying minority-owned firms interested in performing construction, alteration, or renovation work).

5. The Office of Grants and Procurement, HHS.

approval at the discretion of the Federal sponsoring agency.

(7) Some form of price or cost analysis should be made in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

(8) Procurement records and files for purchases in excess of $10,000 shall include the following:

(a) Basis for contractor selection;

(b) Justification for lack of competition when competitive bids or offers are not obtained;

(c) Basis for award cost or price.

(9) A system for contract administration shall be maintained to ensure contractor conformance with terms, conditions and specifications of the contract, and to ensure adequate and timely followup of all purchases.

4. The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. These provisions shall also be applied to subcontracts.

a. Contracts in excess of $10,000 shall contain contractual provisions or conditions that will allow for administrative, contractual or legal remedies in instances in which contractors violate or breach contract terms, and provide for such remedial actions as may be appropriate.

b. All contracts in excess of $10,000 shall contain suitable provisions for termination by the recipient including the manner by which termination will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

c. In all contracts for construction or facility improvement awarded for more than $100,000, recipients shall observe the bonding requirements provided in Attachment B to this circular.[4]

d. All contracts awarded by recipients and their contractors or subgrantees having a value of more than $10,000, shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR, Part 60).

e. All contracts and subgrants in excess of $2,000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kick Back" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal sponsoring agency.

f. When required by the Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR, Part 5). Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal sponsoring agency.

g. When applicable, all contracts awarded by recipients in excess of $2,000 for construction contracts and in excess of $2,500 for other contracts that involve the employment of mechanics or laborers, shall include a provision for compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the workweek. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous to his health and safety as determined under construction safety and health standards promulgated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

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[4] For HHS grants and subgrants, the requirements referred to are those in 45 CFR 74.16.

h. Contracts or agreements, the principal purpose of which is to create, develop or improve products, processes or methods; or for exploration into fields that directly concern public health, safety or welfare; or contracts in the field of science or technology in which there has been little significant experience outside of work funded by Federal assistance, shall contain a notice to the effect that matters regarding rights to inventions and materials generated under the contract or agreement are subject to the regulations issued by the Federal sponsoring agency and the recipient. The contractor shall be advised as to the source of additional information regarding these matters.[5]

i. All negotiated contracts (except those of $10,000 or less) awarded by recipients shall include a provision to the effect that the recipient, the Federal sponsoring agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.[6]

j. Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act of 1970 (42 U.S.C. 1857 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) as amended. Violations shall be reported to the Federal sponsoring agency and the Regional Office of the Environmental Protection Agency.

[45 FR 37671, June 3, 1980; 45 FR 38380, June 9, 1980]

PART 75—INFORMAL GRANT APPEALS PROCEDURES

Subpart A—Indirect Cost Appeals

Sec.

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75.2 Scope.
75.3 Definitions.
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75.5 Submission to the Regional Director.
75.6 Action by the Regional Director.

AUTHORITY: Sections 1, 5, 6, and 7 of Reorganization Plan No. 1 of 1953, 18 FR 2053, 67 Stat. 631.

SOURCE: 40 FR 1242, Jan. 7, 1975, unless otherwise noted.

Subpart A—Indirect Cost Appeals

§ 75.1 Purpose.

This subpart establishes informal procedures for resolving disputes arising in the negotiation of indirect cost rates and certain other cost allocations (as set forth in § 75.2) that are used in determining amounts to be reimbursed under grants awarded by the constituent agencies of the Department of Health and Human Services. A grantee must exhaust the procedures set forth in this subpart prior to appealing a disputed issue(s) to the Departmental Grants Appeals Board under Part 16 of this subtitle.

§ 75.2 Scope.

(a) This subpart applies to disputes arising in the negotiation of the following rates or amounts conducted under the supervision of an Assistant Regional Director for Financial Management of the Department:

(1) Indirect cost rates negotiated with colleges and universities, State and local government agencies, hospitals, and non-profit institutions.

(2) Patient care rates and amounts associated with the care of patients participating in research programs supported by the Department.

(3) Cost allocation plans negotiated with State and local units of government.

(4) Computer, fringe benefit, and other special rates negotiated with colleges and universities, State and local

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[5] HHS Department-wide provisions on inventions arising out of activities assisted by a grant are in 45 CFR Parts 6 and 8. Department-wide provisions on copyrights arising under grants and subgrants are in 45 CFR Part 74, Subpart O. Other provisions on these topics and on rights to data may be in other terms of a grant. If any contract may give rise to works, inventions, patents or data subject to these provisions, the recipient shall place a requirement in the contract for contractor and subcontractor compliance with the provisions.

[6] For clarification of this requirement as it applies to HHS grants and subgrants, see 45 CFR 74.164.

government agencies, hospitals, and non-profit institutions.

(b) Notwithstanding paragraph (a) of this section, this subpart shall not be applicable to disputed issues which are appealed to the Armed Services Board of Contract Appeals under a contract with the Department.

§ 75.3 Definitions.

For purposes of this subpart:

(a) "Department" and "Departmental" refer to the Department of Health and Human Services.

(b) "Regional Director" means a Regional Director of the Department.

(c) "Assistant Regional Director for Financial Management" means an Assistant Regional Director for Financial Management of the Department. The Assistant Regional Director for Financial Management is also known informally as the "Regional Comptroller."

(d) "Grantee" means the agency, institution or organization named as grantee in a grant award document issued by a constituent agency of the Department. For disputes involving cost allocation plans, this term also includes a State or local unit of government which includes an agency that is named as grantee in a grant award document.

§ 75.4 Notification.

When a dispute arises in a negotiation described in § 75.2, the Assistant Regional Director for Financial Management will promptly notify the grantee in writing of the Regional Office's determination concerning the issue(s) involved in the dispute. This notification will set forth the reasons for the determination in sufficient detail to enable the grantee to respond and will inform the grantee of its opportunity for reconsideration under this subpart.

§ 75.5 Submission to the Regional Director.

If the grantee wishes to request reconsideration of the Regional Office's determination, it may submit an application for such reconsideration to the Regional Director. The grantee's application must be postmarked no later than 30 days after the postmark date of the notification described in § 75.4. The Regional Director, however, may grant an extension of time for submission of the application if the extension is requested and justified by the grantee. Although the application need not follow any prescribed format, it must clearly identify the issue(s) in dispute and must contain a full statement of the grantee's position on such issue(s) along with pertinent facts and reasons in support of its position.

§ 75.6 Action by the Regional Director.

(a) Upon receipt of an application for reconsideration, the Regional Director will immediately notify the grantee that its application has been received and will be acted upon as soon as possible.

(b) The Regional Director will review all background material on the issue(s). Within 30 days after receipt of the grantee's application, and with at least 10 days' written notice, he wil provide the grantee with an opportunity to meet with him to discuss the issue(s) and to submit additional information in support of its position. The Regional Director may consult the Assistant Regional Director for Financial Management, other regional officials, Departmental central office officials, and other individuals in conducting the review.

(c) Within 45 days after the meeting described in § 75.6(b) (or 45 days after submission of any supplemental information provided by the grantee) the Regional Director will notify the grantee in writing of his decision. If the Regional Director's decision is adverse to the grantee's position, this notification will state the basis of the decision and will inform the grantee of its right to appeal the decision to the Departmental Grants Appeals Board under Part 16 of this title.

(d) The Regional Director may delegate the responsibilities described in this section to another senior Departmental official in his region. This delegation, however, may not be made to the Assistant Regional Director for Financial Management.

PART 76—DEBARMENT AND SUSPENSION FROM ELIGIBILITY FOR FINANCIAL ASSISTANCE

Subpart A—General

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Subpart C—Suspension

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76.21 Period and scope of suspension.
76.22 Notice of suspension.
76.23 Restrictions during period of suspension
76.24 Publication of notice in FEDERAL REGISTER of results of suspension actions.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 67265, Oct. 9, 1980, unless otherwise noted.

Subpart A—General

§ 76.1 The scope and purpose of these regulations.

(a) *Debarment.* Subpart B prescribes policies and procedures relating to debarment for cause of public and private institutions or individuals (and their affiliates) from eligibility under discretionary programs of financial assistance which are awarded or administered by HHS. Debarment is invoked to exclude institutions and individuals from participation in HHS discretionary programs of financial assistance to protect the interests of the Government, and is not intended to be a penalty or punishment. This measure shall be instituted only for as long as necessary to protect the interests of the Government and financial assistance is precluded only during the period of debarment.

(b) *Suspension.* Subpart C sets forth the procedures for temporary suspension of institutions or individuals (and their affiliates) from eligibility under HHS discretionary programs of financial assistance. Because it is a drastic step taken upon what may be incomplete information, it shall be used cautiously and only when the Secretary believes that grounds for debarment exist (or there is an outstanding indictment for a criminal offense which is grounds for debarment) and there are compelling reasons why immediate action must be taken before debarment proceedings can be completed. In assessing whether adequate evidence exists for invoking suspension, consideration shall be given to the evidence available, to the existence or absence of corroboration as to allegations, as well as to the inferences which may properly be drawn from the existence or absence of facts, and to the irreparable nature of the harm caused by continuing the institution's or individual's eligibility pending debarment proceedings. This assessment shall include an examination of basic documents, such as contracts, grants, inspection reports, and correspondence. A suspension may be terminated or modified whenever it is determined to be in the interest of the Government to do so.

(c) *Relationship to other program responsibilities.* The regulations of this part deal solely with the debarment and suspension of individuals and organizations for future awards and do not limit the discretion of agency officials to take into account the fiscal and administrative capabilities of applicants in connection with particular applications for financial assistance. Termination and suspension for cause of ongoing grants are separate matters which are governed by HHS's grant administration regulations, 45 CFR Part 74, Subpart M. However, debarment and suspension under this part precludes all future awards during the period of debarment or suspension, including competitive and noncompetitive renewal, supplemental, and continuation awards, of financial assistance for a previously supported activity.

[45 FR 67265, Oct. 9, 1980; 45 FR 77439, Nov. 24, 1980]

§ 76.2 Definitions.

As used in this part:

"Affiliate" means an institution which controls, or is controlled by, or is under common control with, another institution or individual. For example, a university foundation and the "parent" university are affiliates if one has the power to control the other with respect to the conduct for which debarment or suspension is sought.

"Discretionary program" means a program of financial assistance which is awarded on the basis of merit or program need and to which an applicant is not entitled as a matter of law.

"Debarment" and "debarred" mean the exclusion from eligibility for financial assistance awarded or administered by HHS under discretionary programs for a reasonable, specified period of time, commensurate with the seriousness of the cause resulting in the debarment.

"Financial assistance" means grants and awards of funds, services, or property (including fellowships, traineeships and National Research Service Awards), cooperative agreements, loans, loan guarantees, and interest subsidies, including competitive and noncompetitive renewal, supplemental, and continuation awards for any of the foregoing.

"HHS" means the Department of Health and Human Services and its operating agencies and component organizations.

"Individual" means a natural person.

"Institution" means any public or private corporation, agency, organization, or institution, which would otherwise be eligible to receive financial assistance under HHS discretionary programs.

"Respondent" means an institution, individual or affiliate who is the subject of a debarment action under §§ 76.14 and 76.15.

"Secretary" means the Secretary of Health and Human Services and any officer or employee of HHS to whom the authority involved has been delegated.

"Suspension", unless the context otherwise requires, means an immediate exclusion from eligibility for financial assistance under discretionary programs without prior hearing pending completion of debarment or other proceedings, as applicable.

Subpart B—Debarment

§ 76.10 Causes for debarment.

Subject to the conditions set forth in § 76.11 and the procedural requirements set forth in §§ 76.14 and 76.15, the Secretary may debar an institution or individual, and any affiliate thereof, in the public interest for any of the following causes:

(a) Conviction for any criminal offense committed as an incident to obtaining or attempting to obtain a public or private contract or any form of financial assistance (or subcontract or subgrant thereunder), or as an incident to performance of any contract, or any form of financial assistance (or any subcontract or subgrant thereunder);

(b) Conviction under the Organized Crime Control Act of 1970, or conviction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility to account for or administer Federal funds;

(c) Conviction under the Federal Antitrust Statutes arising out of the submission of bids, applications or proposals;

(d) Serious violation of the applicable statute, regulations, or other terms and conditions of a previous award of financial assistance;

(e) A record of serious unsatisfactory performance (or failure to perform) under one or more prior awards of financial assistance, contracts or subcontracts, as determined under the terms and conditions or specifications of the prior awards, except that unsatisfactory performance (or failure to perform) caused by acts beyond the control of the institution or individual shall not be considered a basis for debarment;

(f) Debarment from Government contracting, subcontracting, or financial assistance, by a Government agency (including an agency within HHS);

(g) Any other cause significantly affecting responsibility as a recipient or participant under a Federal program of sufficiently serious nature as determined by the Secretary to warrant debarment.

§ 76.11 Conditions for debarment.

(a) *General.* Unless otherwise required by law, the existence of any of the causes set forth in § 76.10 does not effectuate a debarment or necessarily require that an institution or individual be debarred. In each instance, a decision to debar shall be made within the discretion of the Secretary and shall be rendered solely in the best interest of the Government. In addition, mitigating factors, such as the degree of seriousness of the offense, violation, failure, or inadequacy of performance, will be considered in deciding whether debarment is warranted.

(b) The existence of a cause set forth in § 76.10(a), (b), and (c) (relating to conviction of criminal offenses) shall be established by proof of judgment of criminal conviction by a court of competent jurisdiction. In the event that an appeal taken from such conviction results in a reversal, debarment shall be removed on the Secretary's own motion or upon the written request of the institution or individual concerned (unless other cause for debarment exists).

(c) The existence of causes set forth in § 76.10(d), (e), and (g) (relating to violation of grant terms and conditions, performance, and other causes) shall be established by evidence which the Secretary determines to be clear and convincing in nature.

(d) Debarment on the cause set forth in § 76.10(f) (relating to debarment from Government contracting, subcontracting, or financial assistance) may be based entirely on the determination of debarment by the initial debarring agency, or upon a combination of this determination and additional facts.

§ 76.12 Period of debarment.

(a) *General.* Debarment for causes other than debarment from contracting, subcontracting or financial assistance under § 76.10(f) shall be for a reasonable, definite period of time commensurate with the seriousness of the offense, violation, or failure or inadequacy of performance, as necessary to protect the interests of the Government.

(b) *Contract and other prior debarments.* Where debarment is based upon prior debarment from contracts, subcontracts or financial assistance, the period of debarment shall run concurrently with the period of the prior debarment.

(c) *Termination or reduction of period.* Except where prohibited by statute, debarment may be terminated, or the period thereof may be reduced, by the Secretary, on the Secretary's own initiative or upon the submission of an application, supported by documentary evidence, setting forth appropriate grounds for the granting of relief, such as newly discovered material evidence, reversal of conviction, bona fide change of ownership, management, or responsible personnel, or the elimination or correction of the underlying grounds for which the debarment was imposed or other mitigating circumstances. The Secretary may require, as a condition to termination of the debarment period, restitution to HHS by the debarred party for losses sustained by HHS.

(d) *Reinstitution of debarment.* Except where debarment is based upon conviction of a criminal offense, at the end of the termination period the Secretary may reinstitute debarment, through the debarment procedures set forth in this subpart, if the causes have not been corrected or adequate assurance given that the practices will not be repeated.

§ 76.13 Scope of debarment.

(a) *Institutions.* When an institution is the subject of a debarment action, the Secretary may limit the debarment just to those components of the institution which were involved in the conduct leading to debarment.

(b) *Affiliates.* A debarment may include affiliates of an institution or individual which have had notice and opportunity for a hearing in accordance with §§ 76.14 and 76.15. Each decision to include a known affiliate within the scope of a proposed debarment is to be made on a case-by-case basis, after giving due regard to all the relevant facts and circumstances.

(c) *Imputing conduct to institution.* Conduct of an individual may be imputed to the institution, or responsible component of the institution, with which he or she is associated by employment or otherwise, where such conduct was accomplished within the scope of authority or employment and under circumstances in which responsible officials of the institution knew or should have known of the conduct. However, remedial action taken by responsible officials of the institution shall be taken into account in determining whether debarment of the institution is warranted. The institution shall be entitled to notice and opportunity for a hearing in accordance with §§ 76.14 and 76.15.

(d) *Individuals involved in debarable activities.* Where an institution is involved in conduct justifying debarment under this part, any individual who was knowingly involved in the commission of the conduct in question may also be debarred. The individual shall be entitled to notice and opportunity for hearing in accordance with §§ 76.14 and 76.15.

§ 76.14 Procedures—Hearings.

(a) *Initiation of action.* When the Secretary seeks to debar an institution or individual, or any affiliate thereof (called "respondent" for purposes of §§ 76.14 and 76.15), respondents shall be served with written notice from the Secretary by personal service or registered or certified mail, return receipt requested. The notice shall:

(1) State that debarment is being considered;

(2) Set forth the reasons for the proposed debarment and the proposed length of time; and

(3) Indicate that the respondent will be accorded an opportunity for a hearing if the respondent so requests and the request is received within 30 days after the date of mailing or service of the notice to the respondent's last known address.

(b) *Hearing*—(1) *Request for hearing.* Any respondent that has been notified of a proposed action is entitled to request an opportunity to be heard and to be represented by counsel. A hearing request shall be made in writing addressed to the Secretary or other official proposing the action. If at the end of the 30 day period referred to in paragraph (a)(3) of this section, no request has been received, it may be assumed that an opportunity to be heard is not desired, and the Secretary shall proceed to make a final determination and so notify the respondent.

(2) *Notice of hearing.* Upon receipt of a request for an opportunity to be heard, the Secretary shall appoint a hearing officer and the hearing officer shall arrange a prompt and timely hearing. Notice of the time and place of such hearing shall be in writing, transmitted by personal service or registered or certified mail, return receipt requested, and shall include a statement indicating the nature of the proceedings and their purpose. The hearing officer shall determine the place for the hearing. In determining the hearing place, the hearing officer shall consider the convenience of the parties and the public interest.

(c) *Hearing procedures.* (1) Hearings shall be conducted by the hearing officer, who shall be an officer or employee of HHS not previously involved in the matter.

(2) HHS shall be represented by the General Counsel or designee.

(3) A transcribed record shall be made of the proceedings and a copy shall be made available to the respondent upon request, upon payment of any appropriate fee prescribed under the HHS Freedom of Information Act regulations (45 CFR Part 5).

(4) Formal rules of evidence and procedures applicable to proceedings in a court of law will not be applied.

(d) *Scope of hearing; sufficiency of evidence.* The scope of the hearing and sufficiency of evidence shall be governed by the applicable provisions of § 76.11.

[45 FR 67265, Oct. 9, 1980; 45 FR 77439, Nov. 24, 1980]

§ 76.15 Procedures—Determination of hearing officers; review by Secretary.

(a) After completion of the hearing, the hearing officer shall make a written determination on the evidence presented, including where appropriate the extent to which the determination applies to affiliates named in the action. The hearing officer's determination shall be transmitted to the Secretary, and to all respondents by personal service or registered or certified mail, return receipt requested.

(b) The hearing officer's determination shall be final unless within 60 days the respondent requests the Secretary, or the Secretary decides on the Secretary's own motion or at the request of the General Counsel, to review the findings of the hearing officer.

(c) Where a review is granted, the determination by the Secretary shall be final and shall be based solely on the record of the hearing. It shall fully recite the evidentiary grounds upon which the Secretary's determination is made.

(d) Each determination shall become part of the record.

(e) Notice of the Secretary's decision to review the hearing determination and subsequent determination by the Secretary, shall be given in writing to all respondents by personal service or registered or certified mail, return receipt requested.

§ 76.16 Restrictions on debarred institutions and individuals.

(a) *General restrictions.* Institutions and individuals (and their affiliates) debarred under this subpart shall be ineligible during the period of debarment to receive any form of financial assistance under any discretionary program awarded or administered by HHS; applications or requests for financial assistance received under any discretionary program shall not be considered and shall be returned with a statement of the reasons. However, when it is determined essential in the public interest by the Secretary, an exception may be made to permit an institution or individual to apply for and receive support under a particular program on the same basis as other eligible applicants under the program concerned. In addition, where grounds exist, the Secretary may also proceed to terminate or suspend for cause ongoing funded grants awarded to a debarred grantee, as authorized by 45 CFR Part 74, Subpart M.

(b) *Subcontracting and subgranting.* Debarred institutions and individuals shall be ineligible to receive contracts, subcontracts and subgrants under any form of financial assistance awarded or administered by HHS, and the responsible HHS official and recipients of financial assistance, as applicable, shall decline to approve contracting, subcontracting, or subgranting with that institution or individual, unless it is determined by the Secretary to be essential in the best interests of the Government to grant such approval.

(c) *Individuals.* Debarred individuals shall be ineligible to serve or participate under any form of financial assistance awarded or administered by HHS under discretionary programs including service or participation in the conduct or performance of those awards or in the administration of Federal funds. Recipients of financial assistance shall be responsible for compliance with this provision, which constitutes a condition of all awards of financial assistance. Applications for financial assistance proposing debarred individuals to serve as principal investigators, project directors, or those responsible for the administration of Federal funds, or in any other capacity, shall not be considered and shall be returned to the applicant with a statement of the reason therefor.

§ 76.17 Publication of notice in Federal Register of results of debarment actions.

(a) *Contents.* When an institution, individual, or affiliate is debarred under this subpart, HHS shall publish a notice in the FEDERAL REGISTER containing as a minimum the following information:

(1) The names of the debarred institutions, individuals, and affiliates, and their addresses;

(2) The authority under which the action was taken and a brief statement of the reasons for the action;

(3) The extent of restrictions imposed, including effective dates; and

(4) The termination date.

(b) A notice shall also be published in the FEDERAL REGISTER when a debarment is ended prior to its specified termination date.

(c) The Secretary shall also establish and maintain a current, consolidated list of debarred institutions and individuals for purposes of administering affected discretionary programs.

Subpart C—Suspension

§ 76.20 Causes for suspension.

Whenever the Secretary believes that grounds for debarment exist (or there is an outstanding indictment for a criminal offense which is grounds for debarment under § 76.10), and, in order to protect the interests of the United States, immediate action is necessary, the Secretary may suspend an institution, individual, and any affiliate thereof, in accordance with the applicable procedures of this part. This action shall be taken by the Secretary only where there are compelling reasons why the interests of the United States would be jeopardized by waiting for completion of debarment proceedings under Subpart B.

[45 FR 67265, Oct. 9, 1980; 45 FR 77439, Nov. 24, 1980]

§ 76.21 Period and scope of suspension.

(a) A suspension shall be for a temporary period pending the completion of an investigation or hearing, and any administrative or legal proceedings as may result. Unless earlier terminated as the result of a hearing held pursuant to § 76.22(f), the period and scope of suspension shall be as follows:

(1) Except where suspension is based on criminal indictment, debarment proceedings shall be initiated within 6 months after notice of suspension, in accordance with Subpart B, or the suspension shall be terminated automatically. When the debarment proceedings are initiated within the 6-month period, the suspension shall continue in effect pending the completion of debarment proceedings or for a period not to exceed 12 months after the date of the notice of proposed debarment, whichever first occurs.

(2) When suspension is based upon criminal indictment, it may continue until completion of the criminal proceedings, or for 18 months, whichever first occurs.

(b) Suspension may include all known affiliates of an institution or individual who have received notice and opportunity for hearing as set forth in § 76.22.

(c) A decision to include affiliates in a proposed supsension is a separate determination which shall be made on a case-by-case basis.

(d) The conduct of an individual may be imputed to the institution, or responsible component of the institution, with which he or she is associated by employment or otherwise when the conduct involved was performed within the scope of authority or employment and under circumstances in which responsible officials of the institution knew or should have known of the conduct. However, remedial action taken by responsible officials of the institution shall be taken into account in determining whether suspension of the institution is warranted. The institution shall be entitled to notice and opportunity for a hearing in accordance with § 76.22.

(e) *Individuals involved in activities resulting in suspension.* Where an institution is involved in conduct justifying suspension under this part, any individual who was knowingly involved in the commission of the conduct in question may also be suspended. The individual shall be entitled to notice and opportunity for a hearing in accordance with § 76.22.

§ 76.22 Notice of suspension.

When an institution or individual or any affiliate thereof is suspended, the Secretary shall furnish all the affected parties immediately with a notice of the suspension by personal service or registered or certified mail, return receipt requested. The notice of suspension shall state that:

(a) The suspension is based on (1) an outstanding indictment for a criminal offense which is grounds for debarment under § 76.10 or (2) reasonable evidence that the institution or individual has committed irregularities of a serious nature which would be grounds for debarment under § 76.10 (the notice shall identify the indictment or describe the nature of the irregularities, in general terms, without disclosing the Government's evidence);

(b) The suspension is for a temporary period pending the completion of debarment or other proceedings, as applicable;

(c) Bids, proposals, and applications for financial assistance will not be solicited or accepted from the institution or individual and, if received, will not be considered, and awards of any form of financial assistance under HHS discretionary programs may not be made unless it is determined by the Secretary to be in the best interest of the Government;

(d) The institution or individual will not be eligible for the award of a subcontract or subgrant. Whenever the institution or individual is proposed as a subcontract or subgrantee, the responsible HHS official will decline to approve subcontracting or subgranting with that institution or individual in any instance in which consent is required of the Government before the subcontract or subgrant is made, unless it is determined by the Secretary to be in the best interest of the Government to grant approval;

(e) The suspension is effective throughout HHS, and

(f) A hearing as to whether the suspension should be continued will be provided upon request of the institution or individual or any affected affiliate. The hearing shall be conducted, to the extent practical in accordance with the procedures set forth in §§ 76.14 and 76.15.

§ 76.23 Restrictions during period of suspension.

During a period of suspension of an institution or individual and any affiliate, the following policies and procedures shall be applicable:

(a) *General restrictions.* Institutions and individuals (and their affiliates) suspended under this subpart shall be ineligible during the period of suspension to receive any form of financial assistance under any discretionary program awarded or administered by HHS; applications or requests for financial assistance received under any discretionary program shall not be considered and shall be returned with a statement of the reasons. However, when it is determined essential in the public interest by the Secretary, an exception may be made to permit an institution or individual to apply for and receive support under a particular program on the same basis as other eligible applicants under the program concerned. In addition, where grounds exist, the Secretary may also proceed to terminate or suspend for cause ongoing funded grants awarded to a suspended grantee, as authorized by 45 CFR Part 74, Subpart M.

(b) *Subcontracting and subgranting.* Suspended institutions and individuals shall be ineligible to receive contracts, subcontracts and subgrants under any form of financial assistance awarded or administered by HHS, and the responsible HHS official and recipients of financial assistance, as applicable, shall decline to approve contracting, subcontracting or subgranting with that institution or individual, unless it is determined by the Secretary to be essential in the best interests of the Government to grant such approval.

(c) *Individuals.* Suspended individuals shall be ineligible to serve or participate under any form of financial assistance awarded or administered by HHS under discretionary programs, including service or participation in the conduct or performance of those awards, or in the administration of Federal funds. Recipients of financial assistance shall be responsible for compliance with this provision, which constitutes a condition of all awards of financial assistance. Applications for financial assistance proposing suspended individuals to serve as principal investigators, project directors, or those responsible for administration of Federal funds, or in any other capacity, shall not be considered and shall be returned to the applicant with a statement of the reason therefor.

[45 FR 67265, Oct. 9, 1980; 45 FR 77439, Nov. 24, 1980]

§ 76.24 Publication of notice in Federal Register of results of suspension actions.

(a) When an institution or individual is suspended under this subpart, HHS shall publish a notice in the FEDERAL REGISTER containing as a minimum the following information:

(1) The names of the suspended institutions and individuals, and any affiliates, and their addresses;

(2) The authority under which the action was taken and a brief statement of the reasons for the action;

(3) The extent of restrictions imposed, including effective date; and

(4) Statement that the suspension is for a temporary period of time, pending the completion of debarment or other proceedings, as applicable.

(b) A notice shall also be published in the FEDERAL REGISTER when a suspension is ended.

(c) The Secretary shall also establish and maintain a current, consolidated list of suspended institutions and individuals for purposes of administering affected discretionary programs.

PART 80—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH AND HUMAN SERVICES EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.

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APPENDIX A—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d-1, unless otherwise noted.

SOURCE: 29 FR 16298, Dec. 4, 1964, unless otherwise noted.

§ 80.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health and Human Services.

(Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17982, July 5, 1973]

§ 80.2 Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3)

[38 FR 17979, July 5, 1973]

§ 80.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(*a*) Projects under the Public Works Acceleration Act, Public Law 87-658, 42 U.S.C. 2641-2643.

(*b*) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(*c*) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(*d*) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

(Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d-1, 2000d-3)

[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17979, 17982, July 5, 1973]

§ 80.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182; 80 Stat. 1209; 42 U.S.C. 2000d-5)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17980, 17982, July 5, 1973]

§ 80.5 Illustrative application.

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by Title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In Federally assisted programs for the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3(e).

(b) In federally-affected area assistance (P.L. 815 and P.L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

(d) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(e) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In case of hospital construction grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

(f) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b) (6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

[29 FR 16298, Dec. 4, 1964; 29 FR 16988, Dec. 11, 1964, as amended at 38 FR 17980, 17982, July 5, 1973]

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to re-

store fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d-2)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967]

§ 80.12 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health and Human Services, and of Labor, 45 CFR Part 70; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 45 CFR Part 181.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.13 Definitions.

As used in this part—

(a) The term "Department" means the Department of Health and Human Services, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health and Human Services.

(c) The term "responsible Department official" means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 80.10(a)-(d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provison of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964; 29 FR 16988, Dec. 11, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

APPENDIX A—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

Part 1. Assistance other than for State-Administered Continuing Programs

1. Loans for acquisition of equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).

2. Construction of facilities for institutions of higher education (20 U.S.C. 701-758).

3. School Construction in federally-affected and in major disaster areas (20 U.S.C. 631-647).

4. Construction of educational broadcast facilities (47 U.S.C. 390-399).

5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).

6. Demonstration residential vocational education schools (20 U.S.C. 1321).

7. Research and related activities in education of handicapped children (20 U.S.C. 1441).

8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperation Research Act (20 U.S.C. 331-332(b)).

9. Research in teaching modern foreign languages (20 U.S.C. 512).

10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a-2610c).

11. Research and training projects in Vocational Education (20 U.S.C. 1281(a), 1282-1284).

12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461-465).

13. Grants for training in librarianship (20 U.S.C. 1031-1033).

14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).

15. Allowances for institutions training teachers and related educational personnel in elementary and secondary education, or post-secondary vocational education (20 U.S.C. 1111-1118).

16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101-1107a).

17. Operation and maintenance of schools in Federally-affected and in major disaster areas (20 U.S.C. 236-241; 241-1; 242-244).

18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special educational problems occasioned by desegregation (42 U.S.C. 2000c-3).

19. Grants for in-service training of teachers and other schools personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c-4).

20. Higher education students loan program (Title II, National Defense Education Act, 20 U.S.C. 421-429).

21. Educational Opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (Title IV, Higher Education Act of 1965, 20 U.S.C. 1061-1087).

22. Grants and contracts for the conduct of Talent Search, Upward Bound, and Special Services Programs (20 U.S.C. 1068).

23. Land-grant college aid (7 U.S.C. 301-308; 321-326; 328-331).

24. Language and area centers (Title VI, National Defense Education Act, 20 U.S.C. 511).

25. American Printing House for the Blind (20 U.S.C. 101-105).

26. Future Farmers of America (36 U.S.C. 271-391) and similar programs.

27. Science clubs (P.L. 85-875, 20 U.S.C. 2, note).

28. Howard University (20 U.S.C. 121-129).

29. Gallaudet College (31 D.C. Code, Ch. 10).

30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 D.C. Code 1051-1053; 80 Stat. 1027-1028).

31. Faculty development programs, workshops and institutes (20 U.S.C. 1131-1132).

32. National Technical Institute for the Deaf (20 U.S.C. 681-685).

33. Institutes and other programs for training educational personnel (Parts D, E, & F, Title V, Higher Education Act of 1965) (20 U.S.C. 1119-1119c-4).

34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).

35. Acquisition of college library resources (20 U.S.C. 1021-1028).

36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051-1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751-2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121-1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171-1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Commissioner of Education to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (20 U.S.C. 841-844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1434).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b-880b-6).

49. Grants to agencies and organizations for Cuban refugees (22) U.S.C. 2601(b)(4).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment, including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental preschool and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private non-profit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809 (a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a-1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133-1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134-1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135-1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136-1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301-1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Project grants and contracts for research and demonstration relating to new or improved health facilities and services (sec. 304, PHS Act, 42 U.S.C. 242b).

63. Grants for construction or modernization of emergency rooms of general hospitals (Title VI, Part C, PHS Act, 42 U.S.C. 291j).

64. Institutional and special projects grants to schools of nursing (sections 805-808, PHS Act, 42 U.S.C. 296d-296g).

65. Grants for construction and initial staffing of facilities for prevention and treatment of alcoholism (sec. 241-2, Community Mental Health Centers Act (42 U.S.C. 2688 f and g).

66. Grants for construction and initial staffing of specialized facilities for the treatment of alcoholics requiring care in such facilities (sec. 243, Community Mental Health Centers Act, 42 U.S.C. 2688h).

67. Special project grants for training programs, evaluation of existing treatment programs, and conduct of significant programs relating to treatment of alcoholics (sec. 246, Community Mental Health Centers Act, 42 U.S.C. 2688j-1).

68. Grants for construction and initial staff of treatment facilities for narcotic addicts (sec. 251, Community Mental Health Centers Act, 42 U.S.C. 2688m).

69. Special project grants for training programs, evaluation of existing treatment programs, and conduct of significant programs relating to treatment of narcotics addicts (sec. 252, Community Mental Health Centers Act, 42 U.S.C. 2688n-1).

70. Grants for consultation services for Community Mental Health Centers, alcoholism prevention and treatment facilities for narcotic addicts, and facilities for mental health of children (sec. 264, Community Mental Health Centers Act, 42 U.S.C. 2688r).

71. Grants for construction and initial staff of facilities for mental health of children (sec. 271, Community Mental Health Centers Act, 42 U.S.C. 2688u).

72. Special project grants for training programs and evaluation of existing treatment program relating to mental health of children (sec. 272, Community Mental Health Centers Act, 42 U.S.C. 2688x).

73. Grants and loans for construction and modernization of medical facilities in the District of Columbia (P.L. 90-457; 82 Stat. 631-3).

74. Teaching facilities for nurse training (secs. 801-804, Public Health Service Act, 42 U.S.C. 296-296c).

75. Teaching facilities for allied health professions personnel (sec. 791, Public Health Service Act, 42 U.S.C. 295h).

76. Mental retardation research facilities (Title VI, Part D, Public Health Service Act, 42 U.S.C. 295-395e).

77. George Washington University Hospital construction (76 Stat. 83, P.L. 87-460, May 31, 1962).

78. Research projects, including conferences, communication activities and primate or other center grants (secs. 301, 303, 304, and 308, Public Health Service Act, 42 U.S.C. 241, 242a, 242b, and 242f).

79. General research support (sec. 301(d), Public Health Service Act, 42 U.S.C. 241).

80. Mental Health demonstrations and administrative studies (sec. 303(a)(2), Public Health Service Act, 42 U.S.C. 242a).

81. Migratory workers health services (sec. 310, Public Health Service Act, 42 U.S.C. 242h).

82. Immunization programs (sec. 317, Public Health Service Act, 42 U.S.C. 247b).

83. Health research training projects and fellowship grants (secs. 301, 433, Public Health Service Act, 42 U.S.C. 242, 289c).

84. Categorical (heart, cancer, etc.) grants for training, traineeships or fellowships (secs. 303, 433, etc., Public Health Service Act, 42 U.S.C. 242a, 289c, etc.).

85. Advanced professional nurse traineeships (sec. 821, Public Health Service Act, 42 U.S.C. 297).

86. Department projects under Appalachian Regional Development Act (40 U.S.C. App. A).

87. Grants to institutions for traineeships for professional public health personnel (sec. 306, Public Health Service Act, 42 U.S.C. 242d).

88. Grants for graduate or specialized training in public health (sec. 309, Public Health Service Act, 42 U.S.C. 242g).

89. Health professions school student loan program (Title VII, Part C, Public Health Service Act, 42 U.S.C. 294-294(k)).

90. Grants for provision in schools of public health of training, consultation and technical assistance in the field of public health and in the administration of state or local public health programs (sec. 309(c)), Public Health Service Act, 42 U.S.C. 242(g)(c)).

91. Project grants for training, studies, or demonstrations looking metropolitan area, or other local area plans for health services (sec. 314(c), Public Health Service Act, 42 U.S.C. 246(c)).

92. Project grants for training, studies, or demonstrations looking toward the development of improved comprehensive health planning (sec. 314(c), Public Health Service Act, 42 U.S.C. 246(c)).

93. Project grants for health services development (sec. 314(e), Public Health Service Act, 42 U.S.C. 246(e)).

94. Institutional and special grants to health professions schools (Title VII, Part E, Public Health Service Act, 42 U.S.C. 295f-295f-4).

95. Improvement grants to centers for allied health professions (sec. 792, Public Health Service Act, 42 U.S.C. 295h-1).

96. Scholarship grants to health professions schools (Title VII, Part F, Public Health Service Act, 42 U.S.C. 295h-1).

97. Scholarship grants to schools of nursing (Title VIII, Part D, Public Health Service Act, 42 U.S.C. 198c-298c-6).

98. Traineeships for advanced training of allied health professions personnel (sec. 793, Public Health Service Act, 42 U.S.C. 295h-2).

99. Contracts to encourage full utilization of nursing educational talent (sec. 868, Public Health Service Act, 42 U.S.C. 298c-7).

100. Grants to community mental health centers for the compensation of professional and technical personnel for the initial operation of new centers or of new services in centers (Community Mental Health Centers Act, Part B, 42 U.S.C. 2688-2688d).

101. Grants for the planning, construction, equipment and operation of multicounty demonstration health projects in the Appalachian region (sec. 202 of Appalachian Regional Development Act, P.L. 89-4, as amended, P.L. 90-103 40 U.S.C. App. 202).

102. Education, research, training, and demonstrations in the fields of heart disease, cancer, stroke and related diseases

(secs. 900-110, Public Health Service Act, 42 U.S.C. 299a-j).

103. Assistance to medical libraries (secs. 390-399, Public Health Service Act, 42 U.S.C. 280b-280b-9).

104. Nursing student loans (secs. 822-828. Public Health Service Act, 42 U.S.C. 297a-g).

105. Hawaii leprosy payments (sec. 331, Public Health Service Act, 42 U.S.C. 255).

106. Heart disease laboratories and related facilities for patient care (sec. 412(d), Public Health Service Act, 42 U.S.C. 287a(d)).

107. Grants for construction of hospitals serving Indians (P.L. 85-151, 42 U.S.C. 2005).

108. Indian Sanitation Facilities (P.L. 86-121, 42 U.S.C. 2004a).

109. Research projects relating to maternal and child health services and crippled children's services (42 U.S.C. 712).

110. Maternal and child health special project grants to State agencies and institutions of higher learning (42 U.S.C. 703(s)).

111. Maternity and infant care and family planning services; special project grants to local health agencies and other organizations (42 U.S.C. 708).

112. Special project grants to State agencies and institutions of higher learning for crippled children's services (42 U.S.C. 704(2)).

113. Special project grants for health of school and preschool children (42 U.S.C. 709) and for dental health of children (42 U.S.C. 710).

114. Grants to institutions of higher learning for training personnel for health care and related services for mothers and children (42 U.S.C. 711).

115. Grants and contracts for the conduct of research, experiments, or demonstrations relating to the developments, utilization, quality, organization, and financing of services, facilities, and resources of hospitals, long-term care facilities, for other medical facilities (sec. 304, Public Health Service Act, as amended by P.L. 90-174, 42 U.S.C. 242b).

116. Health research facilities (Title VII Part A, Public Health Service Act, 42 U.S.C. 292-292j).

117. Teaching facilities for health professions personnel (Title VII, Part B, Public Health Service Act, 42 U.S.C. 293-293h).

118. Project grants and contracts for research, development, training, and studies in the field of electronic product radiation (Sec. 356, Public Health Service Act, 42 U.S.C. 263d).

119. Project grants and contracts for research, studies, demonstrations, training, and education relating to coal mine health (sec. 501, Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173).

120. Surplus real and related personal property disposal (40 U.S.C. 484(k)).

121. Supplementary medical insurance benefits for the aged (Title XVIII, Part A, Social Security Act, 42 U.S.C. 1395c-1395i-2).

122. Issuance of rent-free permits for vending stands, credit unions, employee associations, etc. (20 U.S.C. 107-107f; 45 C.F.R. Part 20; sec. 25, 12 U.S.C. 1170).

123. Grants for special vocational rehabilitation projects (29 U.S.C. 34(a)(1)).

124. Experimental, pilot or demonstration projects to promote the objectives of Title I, X, XIV, XVI, or XIX or Part A of Title IV of the Social Security Act (42 U.S.C. 1315).

125. Social Security and welfare cooperative research or demonstration projects (42 U.S.C. 1310).

126. Child welfare research, training, or demonstration projects (42 U.S.C. 626).

127. Training projects (Title VI, Older Americans Act, 42 U.S.C. 3041-3042).

128. Grants for expansion of vocational rehabilitation services (29 U.S.C. 34(a)(2) (A)).

129. Grants for construction of rehabilitation facilities (29 U.S.C. 41a(a)-(e)) and for initial staffing of rehabilitation facilities (29 U.S.C. 41a(f)).

130. Project development grants for rehabilitation facilities (29 U.S.C. 41a(g)(2)).

131. Rehabilitation Facility improvement grants (29 U.S.C. 41b(b)).

132. Agreement for the establishment and operation of a national center for deaf-blind youths and adults (29 U.S.C. 42a).

133. Project grants for services for migratory agricultural workers (29 U.S.C. 42b).

134. Grants for initial staffing of community mental retardation facilities (42 U.S.C. 2678-2678d).

135. Grants for training welfare personnel and for expansion and development of undergraduate and graduate social work programs (42 U.S.C. 906, 908).

136. Research and development projects concerning older Americans (42 U.S.C. 3031-3032).

137. Grants to States for training of nursing home administrators (42 U.S.C. 1396g (e)).

138. Contracts or jointly financed cooperative arrangements with industry (29 U.S.C. 34(a)(2)(B)).

139. Project grants for new careers in rehabilitation (29 U.S.C. 34(a)(2)(C)).

140. Children of low-income families (20 U.S.C. 241a-241m).

141. Grants for training (29 U.S.C. 37(a) (2)).

142. Grants for projects for training services (29 U.S.C. 41b(a)).

143. Grants for comprehensive juvenile delinquency planning (42 U.S.C. 3811).

144. Grants for project planning in juvenile delinquency (42 U.S.C. 3812).

145. Grants for juvenile delinquency rehabilitative services projects (42 U.S.C. 3822, 3842).

146. Grants for juvenile delinquency preventive service projects (42 U.S.C. 3861).

147. Grants for training projects in juvenile delinquency fields (42 U.S.C. 3861).

148. Grants for development of improved techniques and practices in juvenile delinquency services (42 U.S.C. 3871).

149. Grants for technical assistance in juvenile delinquency services (42 U.S.C. 3872).

150. Grants for State technical assistance to local units in juvenile delinquency services (42 U.S.C. 3873).

151. Grants for public service centers projects (42 U.S.C. 2744).

152. Grants to public or private non-profit agencies to carry on the Project Headstart Program (42 U.S.C. 2809(a)(1)).

153. Project grants for new careers for the handicapped (29 U.S.C. 34(a)(2)(D)).

154. Construction, demonstration, and training grants for university-affiliated facilities for persons with developmental disabilities (42 U.S.C. 2661-2666).

Part 2. Continuing Assistance to State Administered Programs.

1. Grants to States for public library services and construction, interlibrary cooperation and specialized State library services for certain State institutions and the physically handicapped (20 U.S.C. 351-355).

2. Grants to States for strengthening instruction in academic subjects (20 U.S.C. 441-444).

3. Grants to States for vocational education (20 U.S.C. 1241-1264).

4. Arrangements with State education agencies for training under the Manpower Development and Training Act (42 U.S.C. 2601-2602, 2610a).

5. Grants to States to assist in the elementary and secondary education of children of low-income families (20 U.S.C. 241a-241m).

6. Grants to States to provide for school library resources, textbooks and other instructional materials for pupils and teachers in elementary and secondary schools (20 U.S.C. 821-827).

7. Grants to States to strengthen State departments of education (20 U.S.C. 861-870).

8. Grants to States for community service programs (20 U.S.C. 1001-1011).

9. Grants to States for adult basic education and related research, teacher training and special projects (20 U.S.C. 1201-1211).

10. Grants to State educational agencies for supplementary educational centers and services, and guidance, counseling and testing (20 U.S.C. 841-847).

11. Grants to States for research and training in vocational education (20 U.S.C. 1281(b)).

12. Grants to States for exemplary programs and projects in vocational education (20 U.S.C. 1301-1305).

13. Grants to States for residential vocational education schools (20 U.S.C. 1321).

14. Grants to States for consumer and homemaking education (20 U.S.C. 1341).

15. Grants to States for cooperative vocational educational program (20 U.S.C. 1351-1355).

16. Grants to States for vocational work-study programs (20 U.S.C. 1371-1374).

17. Grants to States to attract and qualify teachers to meet critical teaching shortages (20 U.S.C. 1108-1110c).

18. Grants to States for education of handicapped children (20 U.S.C. 1411-1414).

19. Grants for administration of State plans and for comprehensive planning to determine construction needs of institutions of higher education (20 U.S.C. 715(b)).

20. Grants to States for comprehensive health planning (sec. 314(a), Public Health Service Act, 42 U.S.C. 246(a)).

21. Grants to States for establishing and maintaining adequate public health services (sec. 314(d), Public Health Service Act, 42 U.S.C. 246(d)).

22. Grants, loans, and loan guarantees with interest subsidies for hospital and medical facilities (Title VI, Public Health Service Act, 42 U.S.C. 291 et seq.).

23. Grants to States for community mental health centers construction (Community Mental Health Centers Act, Part A, 42 U.S.C. 2681-2687).

24. Cost of rehabilitation services (Title II, Social Security Act sec. 222(d); 42 U.S.C. 422(d)).

25. Surplus personal property disposal donations for health and educational purposes through State agencies (40 U.S.C. 484(j)).

26. Grants for State and community programs on aging (Title III, Older Americans Act, 42 U.S.C. 3021-3025).

27. Grants to States for planning, provision of services, and construction and operation of facilities for persons with developmental disabilities (42 U.S.C. 2670-2677c).

28. Grants to States for vocational rehabilitation services (29 U.S.C. 32); for innovation of vocational rehabilitation services (29 U.S.C. 33); and for rehabilitation facilities planning (29 U.S.C. 41a(g)(1)).

29. Designation of State licensing agency for blind operators of vending stands (20 U.S.C. 107-107f).

30. Grants to States for old-age assistance (42 U.S.C. 301 et seq.); aid to families with dependent children (42 U.S.C. 601 et seq.); child-welfare services (42 U.S.C. 620 et seq.); aid to the blind (42 U.S.C. 1201 et seq.); aid to the permanently and totally disabled (42 U.S.C. 1351 et seq.); aid to the aged, blind, or disabled (42 U.S.C. 1381 et seq.); medical assistance (42 U.S.C. 1396 et seq.).

31. Grants to States for maternal and child health and crippled children's services (42 U.S.C. 701-707); for special projects for maternal and infant care (42 U.S.C. 708).

32. Grants to States for juvenile delinquency preventive and rehabilitative services (42 U.S.C. 3841).

[29 FR 16298, Dec. 4, 1964; 29 FR 16988, Dec. 11, 1964, as amended at 30 FR 35, Jan. 5, 1965]

Appendix B—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

I. Scope and Coverage

A. APPLICATION OF GUIDELINES

These Guidelines apply to recipients of any Federal financial assistance from the Department of Health and Human Services that offer or administer programs of vocational education or training. This includes State agency recipients.

B. DEFINITION OF RECIPIENT

The definition of "recipient" of Federal financial assistance is established by Department regulations implementing Title VI, Title IX, and Section 504 (45 CFR 80.13(i), 86.2(h), 84.3(f).

For the purposes of Title VI:

The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary [e.g., students] under any such program. (45 CFR 80.13(i)).

For the purpose of Title IX:

"Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof. (45 CFR 86.2(h)).

For the purposes of Section 504:

"Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. (45 CFR 84.3(f)).

C. EXAMPLES OF RECIPIENTS COVERED BY THESE GUIDELINES

The following education agencies, when they provide vocational education, are examples of recipients covered by these Guidelines:

1. The board of education of a public school district and its administrative agency.
2. The administrative board of a specialized vocational high school serving students from more than one school district.
3. The administrative board of a technical or vocation school that is used exclusively or principally for the provision of vocational education to persons who have completed or left high school (including persons seeking a certificate or an associate degree through a vocational program offered by the school) and who are available for study in preparation for entering the labor market.
4. The administrative board of a postsecondary institution, such as a technical institute, skill center, junior college, community college, or four year college that has a department or division that provides vocational education to students seeking immediate employment, a certificate or an associate degree.
5. The administrative board of a proprietary (private) vocational education school.
6. A State agency recipient itself operating a vocational education facility.

D. EXAMPLES OF SCHOOLS TO WHICH THESE GUIDELINES APPLY

The following are examples of the types of schools to which these Guidelines apply.

1. A junior high school, middle school, or those grades of a comprehensive high school that offers instruction to inform, orient, or prepare students for vocational education at the secondary level.
2. A vocational education facility operated by a State agency.
3. A comprehensive high school that has a department exclusively or principally used for providing vocational education; or that offers at least one vocational program to secondary level students who are available for study in preparation for entering the labor market; or that offers adult vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market.
4. A comprehensive high school, offering the activities described above, that receives students on a contract basis from other school districts for the purpose of providing vocational education.

5. A specialized high school used exclusively or principally for the provision of vocational education, that enrolls students from one or more school districts for the purpose of providing vocational education.

6. A technical or vocational school that primarily provides vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, including students seeking an associate degree or certificate through a course of vocational instruction offered by the school.

7. A junior college, a community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, an associate degree or a certificate through a course of vocational instruction offered by the school.

8. A proprietary school, licensed by the State, that offers vocational education.

NOTE.—Subsequent sections of these Guidelines may use the term *secondary vocational education center* in referring to the institutions described in paragraphs 3, 4 and 5 above or the term *postsecondary vocational education center* in referring to institutions described in paragraphs 6 and 7 above or the term *vocational education center* in referring to any or all institutions described above.

II. RESPONSIBILITIES ASSIGNED ONLY TO STATE AGENCY RECIPIENTS

A. RESPONSIBILITIES OF ALL STATE AGENCY RECIPIENTS

State agency recipients, in addition to complying with all other provisions of the Guidelines relevant to them, may not require, approve of, or engage in any discrimination or denial of services on the basis of race, color, national origin, sex, or handicap in performing any of the following activities:

1. Establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State;

2. Establishment of requirements for admission to or requirements for the administration of vocational education programs;

3. Approval of action by local entities providing vocational education. (For example, a State agency must ensure compliance with Section IV of these Guidelines if and when it reviews a vocational education agency decision to create or change a geographic service area.);

4. Conducting its own programs. (For example, in employing its staff it may not discriminate on the basis of sex or handicap.)

B. STATE AGENCIES PERFORMING OVERSIGHT RESPONSIBILITIES

The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (A "subrecipient," in this context, is a local agency or vocational education center that receives financial assistance through a State agency.) This compliance program must include:

1. Collecting and analyzing civil rights related data and information that subrecipients compile for their own purposes or that are submitted to State and Federal officials under existing authorities;

2. Conducting periodic compliance reviews of selected subrecipients (i.e., an investigation of a subrecipient to determine whether it engages in unlawful discrimination in any aspect of its program); upon finding unlawful discrimination, notifying the subrecipient of steps it must take to attain compliance and attempting to obtain voluntary compliance;

3. Providing technical assistance upon request to subrecipients. This will include assisting subrecipients identify unlawful discrimination and instructing them in remedies for and prevention of such discrimination;

4. Periodically reporting its activities and findings under the foregoing paragraphs, including findings of unlawful discrimination under paragraph 2, immediately above, to the Office for Civil Rights.

State agencies are not required to terminate or defer assistance to any subrecipient. Nor are they required to conduct hearings. The responsibilities of the Office for Civil Rights to collect and analyze data, to conduct compliance reviews, to investigate complaints and to provide technical assistance are not diminished or attenuated by the requirements of Section II of the Guidelines.

C. STATEMENT OF PROCEDURES AND PRACTICES

Within one year from the publication of these Guidelines in final form, each State agency recipient performing oversight responsibilities must submit to the Office for Civil Rights the methods of administration and related procedures it will follow to comply with the requirements described in paragraphs A and B immediately above. The Department will review each submission and will promptly either approve it, or return it to State officials for revision.

III. DISTRIBUTION OF FEDERAL FINANCIAL ASSISTANCE AND OTHER FUNDS FOR VOCATIONAL EDUCATION

A. AGENCY RESPONSIBILITIES

Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

B. DISTRIBUTION OF FUNDS

Recipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap. However, a recipient may adopt a formula or other method of allocation that uses as a factor race, color, national origin, sex, or handicap [or an index or proxy for race, color, national origin, sex, or handicap e.g., number of persons receiving Aid to Families with Dependent Children or with limited English speaking ability] if the factor is included to compensate for past discrimination or to comply with those provisions of the Vocational Education Amendments of 1976 designed to assist specified protected groups.

C. EXAMPLE OF A PATTERN SUGGESTING UNLAWFUL DISCRIMINATION

In each State it is likely that some local recipients will enroll greater proportions of minority students in vocational education than the State-wide proportion of minority students in vocational education. A funding formula or other method of allocation that results in such local recipients receiving per-pupil allocations of Federal or State vocational education funds lower than the State-wide average per-pupil allocation will be presumed unlawfully discriminatory.

D. DISTRIBUTION THROUGH COMPETITIVE GRANTS OR CONTRACTS

Each State agency that establishes criteria for awarding competitive vocational education grants or contracts must establish and apply the criteria without regard to the race, color, national origin, sex, or handicap of any or all of a recipient's students, except to compensate for past discrimination.

E. APPLICATION PROCESSES FOR COMPETITIVE OR DISCRETIONARY GRANTS

State agencies must disseminate information needed to satisfy the requirements of any application process for competitive or discretionary grants so that all recipients, including those having a high percentage of minority or handicapped students, are informed of and able to seek funds. State agencies that provide technical assistance for the completion of the application process must provide such assistance without discrimination against any one recipient or class of recipients.

F. ALTERATION OF FUND DISTRIBUTION TO PROVIDE EQUAL OPPORTUNITY

If the Office for Civil Rights finds that a recipient's system for distributing vocational education funds unlawfully discriminates on the basis of race, color, national origin, sex, or handicap, it will require the recipient to adopt an alternative nondiscriminatory method of distribution. The Office for Civil Rights may also require the recipient to compensate for the effects of its past unlawful discrimination in the distribution of funds.

IV. ACCESS AND ADMISSION OF STUDENTS TO VOCATIONAL EDUCATION PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Criteria controlling student eligibility for admission to vocational education schools, facilities and programs may not unlawfully discriminate on the basis of race, color, national origin, sex, or handicap. A recipient may not develop, impose, maintain, approve, or implement such discriminatory admissions criteria.

B. SITE SELECTION FOR VOCATIONAL SCHOOLS

State and local recipients may not select or approve a site for a vocational education facility for the purpose or with the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin. Recipients must locate vocational education facilities at sites that are readily accessible to both nonminority and minority communities, and that do not tend to identify the facility or program as intended for nonminority or minority students.

C. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS BASED ON RESIDENCE

Recipients may not establish, approve or maintain geographic boundaries for a vocational education center service area or attendance zone, (hereinafter "service area"), that unlawfully exclude students on the basis of race, color, or national origin. The Office for Civil Rights will presume, subject to rebuttal, that any one or combination of the following circumstances indicates that the boundaries of a given service area are unlawfully constituted:

1. A school system or service area contiguous to the given service area, contains minority or nonminority students in substan-

tially greater proportion than the given service area;

2. A substantial number of minority students who reside outside the given vocational education center service area, and who are not eligible for the center reside, nonetheless, as close to the center as a substantial number of non-minority students who are eligible for the center;

3. The over-all vocational education program of the given service area in comparison to the over-all vocational education program of a contiguous school system or service area enrolling a substantially greater proportion of minority students: (a) provides its students with a broader range of curricular offerings, facilities and equipment; or (b) provides its graduates greater opportunity for employment in jobs: (i) for which there is a demonstrated need in the community or region; (ii) that pay higher entry level salaries or wages; or (iii) that are generally acknowledged to offer greater prestige or status.

D. ADDITIONS AND RENOVATIONS TO EXISTING VOCATIONAL EDUCATION FACILITIES

A recipient may not add to, modify, or renovate the physical plant of a vocational education facility in a manner that creates, maintains, or increases student segregation on the basis of race, color, national origin, sex, or handicap.

E. REMEDIES FOR VIOLATIONS OF SITE SELECTION AND GEOGRAPHIC SERVICE AREA REQUIREMENTS

If the conditions specified in paragraphs IV, A, B, C, or D, immediately above, are found and not rebutted by proof of nondiscrimination, the Office for Civil rights will require the recipient(s) to submit a plan to remedy the discrimination. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination: (1) redrawing of the boundaries of the vocational education center's service area to include areas unlawfully excluded and/or to exclude areas unlawfully included; (2) provision of transportation to students residing in areas unlawfully excluded; (3) provision of additional programs and services to students who would have been eligible for attendance at the vocational education center but for the discriminatory service area or site selection; (4) reassignment of students; and (5) construction of new facilities or expansion of existing facilities.

F. ELIGIBILITY FOR ADMISSION TO SECONDARY VOCATIONAL EDUCATION CENTERS BASED ON NUMERICAL LIMITS IMPOSED ON SENDING SCHOOLS

A recipient may not adopt or maintain a system for admission to a secondary vocational education center or program that limits admission to a fixed number of students from each sending school included in the center's service area if such a system disproportionately excludes students from the center on the basis of race, sex, national origin or handicap. (Example: Assume 25 percent of a school district's high school students are black and that most of those black students are enrolled in one high school; the white students, 75 percent of the district's total enrollment, are generally enrolled in the five remaining high schools. This paragraph prohibits a system of admission to the secondary vocational education center that limits eligibility to a fixed and equal number of students from each of the district's six high schools.)

G. REMEDIES FOR VIOLATION OF ELIGIBILITY BASED ON NUMERICAL LIMITS REQUIREMENTS

If the Office for Civil Rights finds a violation of paragraph F, above, the recipient must implement an alternative system of admissions that does not disproportionately exclude students on the basis of race, color, national origin, sex, or handicap.

H. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS, BRANCHES OR ANNEXES BASED UPON STUDENT OPTION

A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if: 1) it was established by a recipient for members of one race, national origin or sex; or 2) it has since its construction been attended primarily by members of one race, national origin or sex; or 3) most of its program offerings have traditionally been selected predominantely by members of one race, national origin or sex.

I. REMEDIES FOR FACILITY SEGREGATION UNDER STUDENT OPTION PLANS

If the conditions specified in paragraph IV-H are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the segregation. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) elimination of program duplication in the segregated facility and other proximate vocational facilities; (2) relocation or "clustering" of programs or courses; (3) adding programs and courses that traditionally have been identified as intended for members of a particular race, national origin or sex to schools that have traditionally served members of the other sex or traditionally served persons of a different race or nation-

al origin; (4) merger of programs into one facility through school closings or new construction; (5) intensive outreach recruitment and counseling; (6) providing free transportation to students whose enrollment would promote desegregation.

[Paragraph J omitted]

K. ELIGIBILITY BASED ON EVALUATION OF EACH APPLICANT UNDER ADMISSIONS CRITERIA

Recipients may not judge candidates for admission to vocational education programs on the basis of criteria that have the effect of disproportionately excluding persons of a particular race, color, national origin, sex, or handicap. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admissions criteria that must meet this test are past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diplomas and standardized tests, such as the Test of Adult Basic Education (TABE).

An introductory, preliminary, or exploratory course may not be established as a prerequisite for admission to a program unless the course has been and is available without regard to race, color, national origin, sex, and handicap. However, a course that was formerly only available on a discriminatory basis may be made a prerequisite for admission to a program if the recipient can demonstrate that: (a) the course is essential to participation in the program; *and* (b) the course is presently available to those seeking enrollment for the first time and to those formerly excluded.

L. ELIGIBILITY OF NATIONAL ORIGIN MINORITY PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

Recipients may not restrict an applicant's admission to vocational education programs because the applicant, as a member of a national origin minority with limited English language skills, cannot participate in and benefit from vocational instruction to the same extent as a student whose primary language is English. It is the responsibility of the recipient to identify such applicants and assess their ability to participate in vocational instruction.

Acceptable methods of identification include: (1) identification by administrative staff, teachers, or parents of secondary level students; (2) identification by the student in postsecondary or adult programs; and (3) appropriate diagnostic procedures, if necessary.

Recipients must take steps to open all vocational programs to these national origin minority students. A recipient must demonstrate that a concentration of students with limited English language skills in one or a few programs is not the result of discriminatory limitations upon the opportunities available to such students.

M. REMEDIAL ACTION IN BEHALF OF PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

If the Office for Civil Rights finds that a recipient has denied national origin minority persons admission to a vocational school or program because of their limited English language skills or has assigned students to vocational programs solely on the basis of their limited English language skills, the recipient will be required to submit a remedial plan that insures national origin minority students equal access to vocational education programs.

N. EQUAL ACCESS FOR HANDICAPPED STUDENTS

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must: (1) modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more limited for handicapped persons than for non-handicapped persons.

O. PUBLIC NOTIFICATION

Prior to the beginning of each school year, recipients must advise students, parents, employees and the general public that all vocational opportunities will be offered without regard to race, color, national origin, sex, or handicap. Announcement of this policy of non-discrimination may be made, for example, in local newspapers, recipient publications and/or other media that reach the general public, program beneficiaries, minorities (including national origin minorities with limited English language skills), women, and handicapped persons. A brief summary of program offerings and admission criteria should be included in the announcement; also the name, address and telephone number of the person designated to coordinate Title IX and Section 504 compliance activity.

If a recipient's service area contains a community of national origin minority persons with limited English language skills, public notification materials must be disseminated to that community in its language and must state that recipients will take steps to assure that the lack of English language skills will not be a barrier to admission and participation in vocational education programs.

V. COUNSELING AND PREVOCATIONAL PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. COUNSELING AND PROSPECTS FOR SUCCESS

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. STUDENT RECRUITMENT ACTIVITIES

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. COUNSELING OF STUDENTS WITH LIMITED ENGLISH-SPEAKING ABILITY OR HEARING IMPAIRMENTS

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. PROMOTIONAL ACTIVITIES

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the extent possible they should portray males or females, minorities or handicapped persons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING

A. ACCOMMODATIONS FOR HANDICAPPED STUDENTS

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 45 CFR Part 84, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin minority persons with limited English language skills, such information must be disseminated to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDARY VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opportunities without discrimination based on race, color, national origin, sex, or handicap. This obligation extends to recipients that provide on-campus housing and/or that have agreements with providers of off-campus housing. In particular, a recipient postsecondary vocational education program that provides on-campus or off-campus housing to its nonhandicapped students must provide, at the same cost and under the same conditions, comparable convenient and accessible housing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing rooms, showers, and other facilities for students of one sex that are comparable to those provided to students of the other sex. This may be accomplished by alternating use of the same facilities or by providing separate, comparable facilities.

Such facilities must be adapted or modified to the extent necessary to make the vocational education program readily accessible to handicapped persons.

VII. Work Study, Cooperative Vocational Education, Job Placement, and Apprentice Training

A. RESPONSIBILITIES IN COOPERATIVE VOCATIONAL EDUCATION PROGRAMS, WORK-STUDY PROGRAMS, AND JOB PLACEMENT PROGRAMS

A recipient must insure that: (a) it does not discriminate against its students on the basis of race, color, national origin, sex, or handicap in making available opportunities in cooperative education, work study and job placement programs; and (b) students participating in cooperative education, work study and job placement programs are not discriminated against by employers or prospective employers on the basis of race, color, national origin, sex, or handicap in recruitment, hiring, placement, assignment to work tasks, hours of employment, levels of responsibility, and in pay.

If a recipient enters into a written agreement for the referral or assignment of students to an employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated without regard to race, color, national origin, sex, or handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. APPRENTICE TRAINING PROGRAMS

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor: (1) that it does not engage in such discrimination against its membership or applicants for membership; and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. Employment of Faculty and Staff

A. EMPLOYMENT GENERALLY

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

B. RECRUITMENT

Recipients may not limit their recruitment for employees to schools, communities, or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap except for the purpose of overcoming the effects of past discrimination. Every source of faculty must be notified that the recipient does not discriminate in employment on the basis of race, color, national origin, sex, or handicap.

C. PATTERNS OF DISCRIMINATION

Whenever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin, or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.

D. SALARY POLICIES

Recipients must establish and maintain faculty salary scales and policy based upon the conditions and responsibilities of employment, without regard to race, color, national origin, sex or handicap.

E. EMPLOYMENT OPPORTUNITIES FOR HANDICAPPED APPLICANTS

Recipients must provide equal employment opportunities for teaching and administrative positions to handicapped applicants who can perform the essential functions of the position in question. Recipients must make reasonable accommodation for the physical or mental limitations of handicapped applicants who are otherwise qualified unless recipients can demonstrate that the accommodation would impose an undue hardship.

F. THE EFFECTS OF PAST DISCRIMINATION

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty. Such steps may include the recruitment or reassignment of qualified persons of a particular race, national origin, or sex, or who are handicapped.

G. STAFF OF STATE ADVISORY COUNCILS OF VOCATIONAL EDUCATION

State Advisory Councils of Vocational Education are recipients of Federal financial assistance and therefore must comply with Section VIII of the Guidelines.

H. EMPLOYMENT AT STATE OPERATED VOCATIONAL EDUCATION CENTERS THROUGH STATE CIVIL-SERVICE AUTHORITIES

Where recruitment and hiring of staff for State operated vocational education centers is conducted by a State civil service employment authority, the State education agency operating the program must insure that recruitment and hiring of staff for the vocational education center is conducted in accordance with the requirements of these Guidelines.

IX. PROPRIETARY VOCATIONAL EDUCATION SCHOOLS

A. RECIPIENT RESPONSIBILITIES

Proprietary vocational education schools that are recipients of Federal financial assistance through Federal student assistance programs or otherwise are subject to all of the requirements of the Department's regulations and these Guidelines.

B. ENFORCEMENT AUTHORITY

Enforcement of the provisions of Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973 is the responsibility of the Department of Health and Human Services. However, authority to enforce Title VI of the Civil rights Act of 1964 for proprietary vocational education schools has been delegated to the Veterans Administration.

When the Office for Civil Rights receives a Title VI complaint alleging discrimination by a proprietary vocational education school it will forward the complaint to the Veterans Administration and cite the applicable requirements of the Department's regulations and these Guidelines. The complainant will be notified of such action.

[38 FR 17982, July 5, 1973; 40 FR 18173, Apr. 25, 1975; 44 FR 17164, Mar. 21, 1979]

PART 81—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

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AUTHORITY: 5 U.S.C. 301 and 45 CFR 80.9(d).

SOURCE: 32 FR 15156, Nov. 2, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 Scope of rules.

The rules of procedure in this part supplement §§ 80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health and Human Services, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§ 81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts, of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health and Human Services, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 81.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 81.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 81.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 81.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 81.21 Parties; General Counsel deemed a party.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent.

(b) The General Counsel of the Department of Health and Human Services shall be deemed a party to all proceedings.

§ 81.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 81.23 Complainants not parties.

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 81.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 81.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only on exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 81.107.

§ 81.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 81.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 81.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 81.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 81.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.9 of this title.

§ 81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.53 Amendment of notice or answer.

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 81.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 81.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 81.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 81.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held or written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 81.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 81.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 81.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 81.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 81.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 81.75 Affidavits.

An affidavit is; not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 81.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute and admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 81.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 81.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 81.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 81.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 81.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 81.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 81.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 81.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decisions, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 81.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 81.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 81.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 81.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the mailing of a final decision referred to in § 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgement of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgement of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 Ex Parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 81.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 81.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to subparagraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 81.131 Definitions.

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health and Human Services, with respect to action by that official under § 81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, and rules in this Part 81 shall apply as if these amendments were not in effect.

PART 83—REGULATION FOR THE ADMINISTRATION AND ENFORCEMENT OF SECTIONS 704 AND 845 OF THE PUBLIC HEALTH SERVICE ACT

Subpart A—Purposes; Definitions; Coverage

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83.1 Purposes.
83.2 Definitions.
83.3 Remedial and affirmative actions.
83.4 Coverage.
83.5 Effect of title IX of the Education Amendments of 1972.
83.6–83.9 [Reserved]

Subpart B—Discrimination in Admissions Prohibited

83.10 General obligations.
83.11 Discriminatory acts prohibited.
83.12 Recruitment.
83.13 State law and licensure requirements.
83.14 Development and dissemination of nondiscrimination policy.
83.15 Designation by entity of responsible employee and adoption of grievance procedures.
83.16–83.19 [Reserved]

Subpart C—Procedures [Interim]

83.20 Interim procedures.

AUTHORITY: Sec. 215(b), Public Health Service Act (42 U.S.C. 216(b)).

SOURCE: 40 FR 28573, July 7, 1975, unless otherwise noted.

Subpart A—Purposes; Definitions; Coverage

§ 83.1 Purposes.

(a) The purposes of this part are (1) to effectuate the provisions of sections

799A and 845 of the Public Health Service Act, which forbid the extension of Federal support under title VII or VIII of that Act to any entity of the types described in those sections unless that entity submits to the Secretary of Health and Human Services an assurance satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs, and (2) to implement the policy of the Secretary that no Federal support will be extended under those titles to any other entity unless that entity submits to the Secretary an assurance satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs.

(b) The objective of this part is to abolish use of sex as a criterion in the admission of individuals to all training programs operated by an entity which receives support under title VII or VIII of the Act, and thereby to foster maximum use of all available human resources in meeting the Nation's needs for qualified health personnel.

§ 83.2 Definitions.

As used in this Part the term—

(a) "Act" means the Public Health Service Act.

(b) "Administrative law judge" means a person appointed by the Reviewing Authority to preside over a hearing held under this Part.

(c) "Assurance commitment clause" means a clause in an invitation for a contract offer extended by the Federal Government under title VII or VIII of the Act which, when executed by an entity as part of such offer, becomes, upon acceptance of such offer by the Federal Government, a contractual obligation of such entity to comply with its assurance submitted to the Director under this Part.

(d) "Department" means the Department of Health and Human Services.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Entity" means (1) a school of medicine, school of dentistry, school of osteopathy, school of pharmacy, school of optometry, school of podiatry, school of veterinary medicine, or school of public health, as defined by section 724 of the Act;

(2) A school of nursing, as defined by section 843 of the Act;

(3) A school or college of a training center for an allied health profession, as defined by section 795 of the Act, or of another institution of undergraduate education which school or college can provide a training program;

(4) An affiliated hospital, as defined by section 724 or 795 of the Act; and

(5) Any other institution, organization, consortium, or agency which is eligible to receive Federal support.

(g) "Federal support" means assistance extended after November 18, 1971, under title VII or VIII of the Act to an entity by means of a grant to, a contract with, or a loan guarantee or interest subsidy payment made on behalf of, such entity.

(h) "Federally supported entity" means an entity which receives Federal support.

(i) "Reviewing authority" means that component of the Department to which the Secretary delegates authority to review the decision of an administrative law judge in a proceeding arising under this Part.

(j) "Secretary" means the Secretary of Health and Human Services.

(k) "Training program" means a program of training described by section 724(4) of the Act, a program of education described by, or specified by regulations pursuant to, section 795(1) of the Act, a program of education described by section 843(c), 843(d), or 843(e) of the Act, and a program leading to any license or certification requisite to the practice of a health profession for which a degree specified in any such section is granted.

§ 83.3 Remedial and affirmative actions.

(a) *Remedial action.* If the Director finds that an entity has discriminated against persons on the basis of sex in any of its training programs, such entity shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in a training program, an entity may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.

§ 83.4 Coverage.

(a) If an entity receives Federal support for any of its training programs, all of its training programs thereby become subject to this part.

(b) The obligation imposed by this part on a Federally supported entity not to discriminate on the basis of sex in the admission of individuals to a training program includes not only the obligation not to discriminate on such basis in the selection of individuals for such program, but also the obligation not to discriminate on such basis against individuals after their selection for such program.

(c) The obligation imposed by this part on a Federally supported entity not to discriminate on the basis of sex against an individual who is an applicant for, or is enrolled in, a training program is applicable to the same extent to the actions of such entity with respect to an applicant for, or a student enrolled in, an undergraduate program of education of such entity if individuals enrolled in such program must complete all or a part of such programs to be eligible for admission to an undergraduate training program of such entity.

(d) An entity shall not discriminate on the basis of sex in violation of this Part for as long as such entity receives or benefits from Federal support. For purposes of the preceding sentence, an entity shall be deemed to continue to receive or benefit from Federal support for as long as it retains ownership, possession, or use of either real or personal property and which was acquired in whole or in part with Federal support. If an entity receives value for property which was acquired in whole or in part with Federal support and such value is applied toward the acquisition of other property, such entity shall be deemed to continue to receive or benefit from such support for as long as such entity retains ownership, use, or possession of such other property.

(e) An entity shall not transfer property which was acquired, constructed, altered, repaired, expanded, or renovated in whole or in part with Federal support unless the agency, organization, or individual to whom such property is to be transferred has submitted to the Director, and he or she has found satisfactory, an assurance of compliance with this Part. The preceding sentence shall not apply with respect to any real or personal property for which payments have been recaptured by the United States under title VII or VIII of the Act, with respect to any other property for which the transferring entity has refunded to the Federal Government the Federal share of the fair market value of such property, or with respect to any personal property which has only scrap value to both the entity and the agency, organization or individual to which the property is to be transferred.

§ 83.5 Effect of title IX of the Education Amendments of 1972.

The obligations imposed by this part are independent of obligations imposed by or pursuant to title IX of the Education Amendments of 1972.

§§ 83.6–83.9 [Reserved]

Subpart B—Discrimination in Admissions Prohibited

§ 83.10 General obligations.

(a) *Eligibility for support.* No entity will be provided Federal support unless such entity has furnished the Director assurances satisfactory to him or her that it will not discriminate on the basis of sex, in violation of this part, in the admission of individuals to each of its training programs.

(b) *Eliminating the effects of discrimination.* An assurance of compliance with this part will not be satisfactory to the Director if the entity submitting such assurance fails to take whatever remedial action in accordance with § 83.3(a) that is necessary for such entity to eliminate the effects of any discrimination on the basis of sex in the admission of individuals to its training programs that such entity practiced prior to the submission to the Director of such assurance, or practices at the time of or subsequent to such submission. The Director may require such entity, as a condition to determining that its assurance is, or remains, satisfactory, to take specific actions, or to submit to him or her specific information, bearing upon compliance with this part.

§ 83.11 Discriminatory acts prohibited.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other training program or activity operated by an entity.

(b) *Discrimination in selection.* In determining whether an individual satisfies any enrollment, eligibility, or other condition for selection for a training program, a Federally supported entity shall not:

(1) On the basis of sex, given preference to one individual over another by ranking applicants on such basis, or otherwise give such preference; or

(2) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(3) Otherwise treat one individual differently from another on the basis of sex.

(c) *Testing.* A federally supported entity shall not administer or operate any test or use any criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown validly to predict success in the training program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(d) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, in providing financial aid or any other benefit, an entity to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat pregnancy, childbirth, termination of pregnancy and any temporary disabilities related to or resulting from pregnancy, childbirth, termination of pregnancy or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss," or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(e) *Preference to students from other institutions in admission.* An entity shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this part.

(f) *Discrimination in the provision of benefits and services*—(1) General. Except as otherwise provided in this Part in providing financial aid or any other benefit, or in providing any service, to an applicant for a training program or to a student enrolled in such program, no Federally supported entity shall on the basis of sex:

(i) Treat one individual differently from another in determining whether such individual satisfies any requirement or condition for the provision of such benefit of service;

(ii) Provide a different benefit or service or provide a benefit or a service in a different manner;

(iii) Deny an individual any such benefit or service;

(iv) Subject an individual to separate treatment or rules of behavior;

(v) Discriminate against any individual by assisting an agency, organization, or individual in providing, in a manner which discriminates on the basis of sex, a benefit or service to applicants for or students enrolled in a training program; or

(vi) Otherwise limit any individual in the enjoyment of any right, privilege, advantage, or opportunity.

(2) *Financial aid established by certain legal instruments.* (i) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein: *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(ii) To ensure nondiscriminatory awards of assistance as required in paragraph (f) (2) (i) of this section, recipients shall develop and use procedures under which:

(A) Students are selected for award of financial assistance on the basis of non-discriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(B) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (f) (2) (ii) (A) of this section; and

(C) No student is denied the award for which he or she was selected under paragraph (f) (2) (ii) (A) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(g) *Housing.* (1) An entity shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this subsection (including housing provided only to married students).

(2) An entity may provide separate housing on the basis of sex.

(3) Housing provided by an entity to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: (i) Proportionate in quantity to the number of students of that sex applying for such housing; and (ii) comparable in quality and cost to the student.

(4) An entity shall not on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(5) An entity which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take reasonable action to ensure that such housing is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. An entity may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(h) *Inter-institutional programs.* If a Federally supported entity aids participation, by any applicant for or student enrolled in any of its training programs, in any program or activity of another organization or agency, such entity shall:

(1) Develop and implement a procedure to assure itself that such organization or agency takes no action with respect to such applicants or students which this Part would prohibit such entity from taking; and

(2) Not aid such participation if such organization or agency takes such action.

(i) *Discrimination in employment prohibited.* A Federally supported entity shall not discriminate on the basis of sex in employment practices relating to its professional and other staff who work directly with applicants for or students enrolled in any of its training programs. The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, pregnancy leave, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 83.12 Recruitment.

(a) *Comparable recruitment.* A Federally supported entity shall, with respect to each of its training programs, make comparable efforts to recruit members of each sex in the geographic area from which such entity attracts its students. A Federally supported entity shall not recruit for any of its training programs exclusively or primarily at organizations or agencies which admit as members or students, or which provide a service for, only members of one sex unless such entity can demonstrate that such action is part of a recruitment program which does not have the effect of discriminating on the basis of sex in selection for a training program.

(b) *Recruitment practices.* A Federally supported entity shall:

(1) Prominently include a statement of its policy of nondiscrimination on the basis of sex in each announcement, bulletin, catalogue, or application form which describes the training program of such entity or is used in connection with the recruitment of employees who will work directly with applicants for or students enrolled in a training program;

(2) Distribute without discrimination on the basis of sex any announcements, bulletins, catalogues, or other materials used in connection with the recruitment of students for a training program or employees who will work directly with applicants for such program or such students; and

(3) Apprise each of its recruitment representatives of its policy of nondiscrimination on the basis of sex, and require such representatives to adhere to such policy.

§ 83.13 State law and licensure requirements.

The obligation of an entity to comply with this part is not obviated or alleviated by any State or local law which would render an applicant for or student enrolled in a training program ineligible on the basis of sex for any license or certificate requisite to the practice of the health profession for which such applicant seeks, or student pursues, training.

§ 83.14 Development and dissemination of nondiscrimination policy.

(a) A Federally supported entity shall develop a written policy statement of nondiscrimination on the basis of sex, in accordance with this part, and shall implement specific and continuing steps to publicize such statement to applicants for admission or employment, students, employees, and sources of referral of applicants for admission or employment.

(b) Each Federally supported entity shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalogue, and application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees who work directly with students and applicants for admission.

(c) A Federally supported entity shall not use or distribute a publication of the type described in this section which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this Part.

§ 83.15 Designation by entity of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A Federally supported entity shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such entity alleging its noncompliance with this part or alleging any action which would be prohibited by this part. The entity shall notify all of its students and employees who work directly with students and applicants for admission of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of entity.* A Federally supported entity shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part. Such procedures shall be in writing and available to all present and prospective students and employees.

§§ 83.16—83.19 [Reserved]

Subpart C—Procedures [Interim]

§ 83.20 Interim procedures.

For the purposes of implementing this Part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to sections 704 and 845 of the Act and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR 80.6 through 80.11 and 45 CFR Part 81.

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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APPENDIX A—ANALYSIS OF FINAL REGULATION

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

SOURCE: 42 FR 22677, May 4, 1977, unless otherwise noted.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health and Human Services and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health and Human Services.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicappped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteeen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applications, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 8 Effect of state or local law or r requirements and effect of emp nent opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test ascore or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to scrren out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided,* That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be

provided relevant information upon request.

§§ 84.15–84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicappped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usuable by handicapped persons.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)).[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

§§ 84.24–84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropraite education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

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[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is belived to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation,

health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditons that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other posesecodary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, privides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not disacriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55–84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6–80.10 and Part 81 of this Title.

[42 FR 22677, May 4, 1977; 42 FR 22888, May 5, 1977]

§§ 84.62–84.99 [Reserved]

[42 FR 22677, May 4, 1977; 42 FR 22888, May 5, 1977]

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient".* Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipient whose sole source of Federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assiting agencies that discriminate on the basis of handicap in providing services to beneficialries of the recipients' programs.

2. *"Federal financial assistance".* In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person".* Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. the most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possesion or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols,* 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid

vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority,* 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick,* Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo,* 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols, supra.*

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(1)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondicrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8(a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recuitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10(a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind laywers may find it more difficult to find jobs that do nonhandicapped lawyers.

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requries certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the

words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services. The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of HHS funds.

17. *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 84.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(B) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure) and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed § 84.18, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be

achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that proivde health, welfare, or other social services may also comply with § 84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilties is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes this "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. Many physicians and dentists, among others, may be eligible for this tax deduction. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.4(c)(2)(iv), prohibiting unnecessarily separate treatment; § 84.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has takenplace." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§84.23 (a) and (b). The regerence to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs; §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of § 84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 84.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 84.34 and 84.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 84.34(c) (formerly § 84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HHS Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Subparagraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 84.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of § 84.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in former § 84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under § 84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. this was not the intent of the provision and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program. would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessibile so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It shoud be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed § 84.52) has been consolidated with the section regulating providers of welfare and social services (proposed § 84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration. Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* As already noted, § 84.53 has been combined with proposed § 84.53 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 84.4(b)(ii) and 84.43(b). New paragaph (a)(3) requires the provision of effective benefits or services, as defined in § 84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§ 84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised § 84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated § 84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tacticle devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regulation as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service. Thus although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be reasonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92—255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

SUBPART G—PROCEDURES

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedureal regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE: For the text of these guidelines, see 45 CFR Part 80, Appendix B.

[42 FR 22677, May 4, 1977, as amended at 44 FR 17168, Mar. 21, 1979]

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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SOURCE: 40 FR 24128, June 4, 1975, unless otherwise noted.

Subpart A—Introduction

§ 86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

§ 86.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health and Human Services.

(c) *"Secretary"* means the Secretary of Health and Human Services.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompty and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a) (1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

§ 86.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.16 and 86.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 Transition plans.

(a) *Submission of plans.* An institution to which § 86.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§§ 86.18–86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such

test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24-86.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives of benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement

or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that pro-

vided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipent shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.43-86.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 86.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.62-86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR 80-6—80-11 and 45 CFR Part 81.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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APPENDIX A—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE: For the text of these guidelines, see 45 CFR Part 80, Appendix B.

[44 FR 17168, Mar. 21, 1979]

PART 90—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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AUTHORITY: Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq.

SOURCE: 44 FR 33776, June 12, 1979, unless otherwise noted.

Subpart A—General

§ 90.1 What is the purpose of the Age Discrimination Act of 1975?

The Age Discrimination Act of 1975, as amended, is designed to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also permits federally assisted programs and activities, and recipients of Federal funds, to continue to use certain age distinctions and factors other than age which meet the requirements of the Act and these regulations.

§ 90.2 What is the purpose of these regulations?

(a) The purpose of these regulations is to state general, government-wide rules for the implementation of the Age Discrimination Act of 1975, as amended, and to guide each agency in the preparation of agency-specific age discrimination regulations.

(b) These regulations apply to each Federal agency which provides Federal financial assistance to any program or activity.

§ 90.3 What programs and activities does the Age Discrimination Act of 1975 cover?

(a) The Age Discrimination Act of 1975 applies to any program or activity receiving Federal financial assistance, including programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 *et seq.*).

(b) The Age Discrimination Act of 1975 does not apply to:

(1) An age distinction contained in that part of a Federal, State of local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assistance for public service employment under the Comprehensive Employment and Training Act of 1974 (CETA), (29 U.S.C. 801 *et seq.*).

§ 90.4 How are the terms in these regulations defined?

As used in these regulations, the term:

"Act" means the Age Discrimination Act of 1975, as amended, (Title III of Public Law 94-135).

"Action" means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

"Age" means how old a person is, or the number of elapsed years form the date of a person's birth.

"Age distinction" means any action using age or an age-related term.

"Age-related term" means a word or words which necessarily imply a particular age or range of ages (for example, "children," "adult," "older persons," but not "student").

"Agency" means a Federal department or agency that is empowered to extend financial assistance.

"Federal financial assistance" means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real and personal property or any interest in or use of property, including:

(1) Transfers or leases of property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

"Recipient" means any State or its political subdivision, any instrumentality of a State or its political sub-division, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

"Secretary" means the Secretary of the Department of Health and Human Services.

"United States" means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, the Trust Territory of the Pacific Islands, the Northern Marianas, and the territories and possessions of the United States.

Subpart B—What is Age Discrimination?

STANDARDS FOR DETERMINING DISCRIMINATORY PRACTICES

§ 90.11 Purpose of this subpart.

The purpose of this subpart is to set forth the prohibitions against age discrimination and the exceptions to those prohibitions.

§ 90.12 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in §§ 90.14, and 90.15 of these regulations.

(a) *General rule:* No person in the United states shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules:* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance, or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 90.13 Definitions of "normal operation" and "statutory objective."

For purposes of §§ 90.14, and 90.15, the terms "normal operation" and "statutory objective" shall have the following meaning:

(a) "Normal operation" means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) "Statutory objective" means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 90.14 Exceptions to the rules against age discrimination. Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action, otherwise prohibited by § 90.12, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

(a) Age is used as a measure or approximation of one or more other characteristics; and

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 90.15 Exceptions to the rules against age discrimination. Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 90.12 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 90.16 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 90.14 and 90.15 is on the recipient of Federal financial assistance.

Subpart C—What are the Responsibilities of the Federal Agencies?

§ 90.31 Issuance of regulations.

(a) The head of each agency which extends Federal financial assistance to any program or activity shall publish proposed and final age discrimination regulations in the FEDERAL REGISTER to:

(1) Carry out the provisions of section 303 of the Age Discrimination Act of 1975; and

(2) Provide for appropriate investigative, conciliation, and enforcement procedures.

(b) Each agency shall publish its proposed agency age discrimination regulations no later than 90 days after the publication date of the final general, government-wide age discrimination regulations.

(c) Each agency shall submit its final agency regulations to HHS for review no later than 120 days after publication of proposed agency age discrimination regulations.

(d) Final agency age discrimination regulations shall be consistent with these general, government-wide age discrimination regulations and shall not be published until the Secretary approves them.

(e) Each agency shall include in its regulations a provision governing the operation of an alternate funds disbursal procedure as described in § 90.48 of these regulations.

(f) Each agency shall publish an appendix to its final age discrimination regulations containing a list of each age distinction provided in a Federal statute or in regulations affecting financial assistance administered by the agency.

§ 90.32 Review of agency policies and administrative practices.

(a) Each agency shall conduct a review of age distinctions it imposes on its recipients by regulations, policies, and administrative practices. The purpose of this review is to identify how age distinctions are used by each Federal agency and whether those age distinctions are permissible under the Act and implementing regulations.

(b) No later than 12 months from the date the agency published its final regulations, the agency shall publish, for public comment, a report in the FEDERAL REGISTER containing:

(1) The results of the review conducted under paragraph (a) of this section;

(2) A list of the age distinctions contained in regulations which are to be continued;

(3) The justification under the requirements of the Act and these regulations for each age distinction to be continued;

(4) A list of the age distinctions not contained in regulations but which will be adopted by regulation under the Administrative Procedure Act using the notice and comment procedures specified in 5 U.S.C. 553; and

(5) A list of the age distinctions to be eliminated.

(c) Beginning with the effective date of an agency's final regulations, the agency may not impose a new age distinction unless the age distinction is adopted by regulation under the Administrative Procedure Act using the notice and comment procedures specified in 5 U.S.C. 553.

(d) Beginning 12 months after the publication of its age discrimination regulations, an agency may not continue an existing age distinction, unless the age distinction has already been adopted by regulation or is adopted by regulation under the Administrative Procedure Act using the notice and comment procedures specified in 5 U.S.C. 553.

§ 90.33 Interagency cooperation.

Where two or more agencies provide Federal financial assistance to a recipient or class of recipients, the Secretary may designate one of the agencies as the sole agency for all compliance and enforcement purposes with respect to those recipients, except for the ordering of termination of funds and the notification of the appropriate committees of Congress.

§ 90.34 Agency reports.

Each agency shall submit to the Secretary not later than December 31 of each year, beginning in 1979, a report which:

(a) Describes in detail the steps taken during the preceding fiscal year to carry out the Act; and

(b) Contains data on the frequency, type, and resolution of complaints and on any compliance reviews, sufficient to permit analysis of the agency's progress in reducing age discrimination in programs receiving Federal financial assistance from the agency; and

(c) Contains data directly relevant to the extent of any pattern or practice of age discrimination which the agency has identified in any programs receiving Federal financial assistance from the agency and to progress toward eliminating it; and

(d) Contains evaluative or interpretative information which the agency determines is useful in analyzing agency progress in reducing age discrimination in programs receiving Federal financial assistance from the agency; and

(e) Contains whatever other data the Secretary may require.

Subpart D—Investigation, Conciliation and Enforcement Procedures

§ 90.41 What is the purpose of this Subpart?

This subpart sets forth requirements for the establishment of compliance, investigation, conciliation, and enforcement procedures by agencies which extend Federal financial assistance.

§ 90.42 What responsibilities do recipients and agencies have generally to ensure compliance with the Act?

(a) A recipient has primary responsibility to ensure that its programs and activities are in compliance with the Age Discrimination Act and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford access to its records to an agency to the extent required to determine whether it is in compliance with the Act.

(b) An agency has responsibility to attempt to secure recipient compliance with the Act by voluntary means. This may include the use of the services of appropriate Federal, State, local, or private organizations. An agency also has the responsibility to enforce the Age Discrimination Act when a recipient fails to eliminate violations of the Act.

§ 90.43 What specific responsibilities do agencies and recipients have to ensure compliance with the Act?

(a) *Written notice, technical assistance, and educational materials.* Each agency shall: (1) Provide written notice to each recipient of its obligations under the Act. The notice shall include a requirement that where the recipient initially receiving funds makes the funds available to a sub-recipient, the recipient must notify the sub-recipient of its obligations under the Act.

(2) Provide technical assistance, where necessary, to recipients to aid them in complying with the Act.

(3) Make available educational materials setting forth the rights and obligations of beneficiaries and recipients under the Act.

(b) *Self-evaluation.* (1) Each agency shall require each recipient employing the equivalent of 15 or more full time employees to complete a written self-evaluation of its compliance under the Act within 18 months of the effective date of the agency regulations.

(2) Each recipient's self-evaluation shall identify and justify each age distinction imposed by the recipient.

(3) Each recipient shall take corrective and remedial action whenever a self-evaluation indicates a violation of the Act.

(4) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of 3 years following its completion.

(c) *Complaints.*—(1) *Receipt of complaints.* Each agency shall establish a complaint processing procedure which includes the following:

(i) A procedure for the filing of complaints with the agency;

(ii) A review of complaints to assure that they fall within the coverage of the Act and contain all information necessary for further processing;

(iii) Notice to the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure; and

(iv) Notice to the complainant and the recipient (or their representatives) of their right to contact the agency for information and assistance regarding the complaint resolution process.

(2) *Prompt resolution of complaints.* Each agency shall establish procedures for the prompt resolution of complaints. These procedures shall require each recipient and complainant to participate actively in efforts toward speedy resolution of the complaint.

(3) *Mediation of complaints.* Each agency shall promptly refer all complaints which fall within the coverage of the Act to a mediation agency designated by the Secretary.

(i) The referring agency shall require the participation of the recipient and the complainant in the mediation process, although both parties need not meet with the mediator at the same time.

(ii) If the complainant and recipient reach a mutually satisfactory resolution of the complaint during the mediation period, they shall reduce the agreement to writing. The mediator shall send a copy of the settlement to the referring agency. No further action shall be taken based on that complaint unless it appears that the complainant or the recipient is failing to comply with the agreement.

(iii) Not more than 60 days after the agency receives the complaint, the mediator shall return a still unresolved complaint to the referring agency for initial investigation. The mediator may return a complaint at any time before the end of the 60 day period if it appears that the complaint cannot be resolved through mediation.

(iv) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the agency appointing the mediator.

(4) *Federal initial investigation.* Each agency shall investigate complaints unresolved after mediation or reopened because of a violation of the mediation agreement. As part of the initial investigation, the agency shall use informal fact finding methods including joint or individual discussions with the complainant and the recipient to establish the facts, and, if possible, resolve the complaint to the mutual satisfaction of the parties. The agency may seek the assistance of any involved State program agency.

(5) *Formal investigation, conciliation, and hearing.* If the agency cannot resolve the complaint during the early stages of the investigation, it shall:

(i) Complete the investigation of the complaint.

(ii) Attempt to achieve voluntary compliance satisfactory to the agency, if the investigation indicates a violation.

(iii) Arrange for enforcement as described in § 90.47, if necessary.

§ 90.44 Compliance reviews.

(a) Each agency shall provide in its regulations that it may conduct compliance reviews, pre-award reviews, and other similar procedures which permit the agency to investigate, and correct, violations of the Act without regard to its procedures for handling complaints.

(b) If a compliance review or preaward review indicates a violation of the Act, the agency shall attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, the agency shall arrange for enforcement as described in § 90.47.

§ 90.45 Information requirements.

Each agency shall provide in its regulations a requirement that the recipient:

(a) Provide to the agency information necessary to determine whether the recipient is in compliance with the Act; and

(b) Permit reasonable access by the agency to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether a recipient is in compliance with the Act.

§ 90.46 Prohibition against intimidation or retaliation.

Each agency shall provide in its regulations that recipients may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act; or

(b) Cooperates in any mediation, investigation, hearing, or other part of the agency's investigation, conciliation, and enforcement process.

§ 90.47 What further provisions must an agency make in order to enforce its regulations after an investigation indicates that a violation of the act has been committed?

(a) Each agency shall provide for enforcement of its regulations through:

(1) Termination of a recipient's Federal financial assistance under the program or activity involved where the recipient has violated the Act or the agency's regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or the agency's regulations.

(ii) Use of any requirement of or referral to any Federal, State, or local government agency which will have the effect of correcting a violation of the Act or implementing regulations.

(b) Any termination under paragraph (a)(1) shall be limited to the particular recipient and particular program or activity receiving Federal financial assistance or portion thereof found to be in violation of the Act or agency regulations. No termination shall be based in whole or in part on a finding with respect to any program or activity which does not receive Federal financial assistance.

(c) No action under paragraph (a) of this section may be taken until:

(1) The head of the agency involved has advised the recipient of its failure to comply with the Act or the agency's regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have elapsed after the head of the agency involved has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the Federal program or activity involved. A report shall be filed whenever any action is taken under paragraph (a) of this section.

(d) An agency may defer granting new Federal financial assistance to a recipient when termination proceedings under paragraph (a)(1) of this section are initiated.

(1) New Federal financial assistance includes all assistance administered by or through the agency for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period. New Federal financial assistance does not include assistance approved prior to the beginning of termination proceedings or to increases in funding as a result of changed computation of formula awards.

(2) A deferral may not begin until the recipient has received a notice of opportunity for a hearing under paragraph (a)(1). A deferral may not continue for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the agency. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

§ 90.48 Alternate funds disbursal procedure.

When an agency withholds funds from a recipient under its regulations issued under § 90.31, the head of the agency may disburse the withheld funds so directly to any public or nonprofit private organization or agency, or State or political subdivision of the State. These alternate recipients must demonstrate the ability to comply with the agency's regulations issued under this Act and to achieve the goals of the Federal statue authorizing the program or activity.

§ 90.49 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take any remedial action which the agency may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, both recipients may be required to take remedial action.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(c) If a recipient operating a program which serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.

§ 90.50 Exhaustion of administrative remedies.

(a) The agency shall provide in its regulations that a complainant may file a civil action following the exhaustion of adminstrative remedies under the Act. Administrative remedies are exhausted if:

(1) 180 days have elapsed since the complainant filed the complaint and the agency has made no finding with regard to the complaint; or

(2) The agency issues any finding in favor of the recipient.

(b) If either of the conditions set forth in § 90.50(a) is satisfied the agency shall:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right, under section 305(e) of the Act, to bring a civil action for injunctive relief that will effect the purposes of the Act; and

(3) Inform the complainant:

(i) That a civil action can only be brought in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that these costs must be demanded in the complaint;

(iii) That before commencing the action the complainant shall give 30 days notice by registered mail to the Secretary, the Attorney General of the United States, the head of the granting agency, and the recipient;

(iv) That the notice shall state: the alleged violation of the Act; the relief requested; the court in which the action will be brought; and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That no action shall be brought if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

Subpart E—Future Review of Age Discrimination Regulations

§ 90.61 Review of general regulations.

The Secretary shall review the effectiveness of these regulations in securing compliance with the Act. As part of this review, 30 months after the effective date of these regulations, the Secretary shall publish a notice of opportunity for public comment on the effectiveness of the regulations. The Secretary will assess the comments and publish the results of the review and assessment in the FEDERAL REGISTER.

§ 90.62 Review of agency regulations.

Each agency shall review the effectiveness of its regulations in securing compliance with the Act. As part of this review, 30 months after the effective date of its regulations, each agency shall publish a notice of opportunity for public comment on the effectiveness of the agency regulations. Each agency shall assess the comments and publish the results of the review in the FEDERAL REGISTER.

PART 95—GENERAL ADMINISTRATION—GRANT PROGRAMS (PUBLIC ASSISTANCE AND MEDICAL ASSISTANCE)

Subpart A—Time Limits for States To File Claims

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Subpart F—Automatic Data Processing Equipment and Services—Conditions for Federal Financial Participation

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AUTHORITY: Sec. 452(a), 83 Stat. 2351, 42 U.S.C. 652(a); sec. 1102, 49 Stat. 647, 42 U.S.C. 1302; sec. 7(b), 68 Stat. 658, 29 U.S.C. 37(b); sec. 139, 84 Stat. 1323, 42 U.S.C. 2577b; sec. 144, 81 Stat. 529, 42 U.S.C. 2678; sec. 1132, 94 Stat. 530, 42 U.S.C. 1320b-2; sec. 306(b), 94 Stat. 530, 42 U.S.C. 1320b-2 note, unless otherwise noted.

Subpart A—Time Limits for States To File Claims

SOURCE: 46 FR 3529, Jan. 15, 1981, unless otherwise noted.

§ 95.1 Scope.

(a) This subpart establishes a two year time limit (15 months in some cases) for a State to claim Federal financial participation in expenditures under State plans approved under the following titles of the Social Security Act:

Title I—Grants to States for Old-Age Assistance and Medical Assistance for the Aged.

Title IV-A—Grants to States for Aid and Services to Needy Families with Dependent Children (except for Section 402(a)(19)(G) of the Act).

Title IV-B—Child Welfare Services.

Title IV-D—Child Support and Establishment of Paternity.

Title IV-E—Foster Care and Adoption Assistance.

Title X—Grants to States for Aid to the Blind.

Title XIV—Grants to States for Aid to the Permanently and Totally Disabled.

Title XVI—Grants to States for Aid to the Aged, Blind, or Disabled (AABD), or for Such Aid and Medical Assistance for the Aged.

Title XIX—Grants to States for Medical Assistance Programs.

Title XX—Grants to States for Services.

(b) This subpart also applies to claims for Federal financial participation by any State which are based on any provision of the Act that is enacted after issuance of these regulations and that provides, on an entitlement basis, for Federal financial participation in expenditures made under State plans or programs.

(c) This subpart explains under what conditions the Secretary may decide to extend the time limit for filing claims when a State believes it has good cause for not meeting the time limit.

§ 95.4 Definitions.

In this subpart—

Adjustment to prior year costs means an adjustment in the amount of a particular cost item that was previously claimed under an interim rate concept and for which it is later determined that the cost is greater or less than that originally claimed.

Audit exception means a proposed adjustment by the responsible Federal agency to any expenditure claimed by a State by virtue of an audit.

Claim means a request for Federal financial participation in the manner and format required by our program regulations, and instructions or directives issued thereunder.

Court-ordered retroactive payment means either a retroactive payment the State makes to an assistance recipient or an individual, under a Federal or State court order or a retroactive payment we make to a State under a Federal court order. Although we may accept these claims as timely, this provision does not mean that we necessarily agree to be bound by a State or Federal decision when we were not a party to the action.

Federal financial participation means the Federal government's share of an expenditure made by a State agency under any of the programs listed in § 95.1.

State agency for the purposes of expenditures for financial assistance under title IV-A and for support enforcement services under title IV-D means any agency or organization of the State or local government which is authorized to incur matchable expenses; for purposes of expenditures under title XIX, means any agency of the State, including the State Medicaid agency, its fiscal agents, a State health agency, or any other State or local organization which incurs matchable expenses; for purposes of expenditures under all other titles, see the definitions in the appropriate program's regulations.

State means the 50 States, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa and the Trust Territories of the Pacific.

The Act means the Social Security Act, as amended.

We, our, and *us* refer to HHS's Health Care Financing Administration, Office of Child Support Enforcement, Office of Human Development Services, or the Social Security Administration, depending on the program involved.

§ 95.7 Time limit for claiming payment for expenditures made after September 30, 1979.

Under the programs listed in § 95.1, we will pay a State for a State agency expenditure made after September 30, 1979, only if the State files a claim with us for that expenditure within 2 years after the calendar quarter in which the State agency made the expenditure. Section 95.19 lists the exceptions to this rule.

§ 95.10 Time limit for claiming payment for expenditures made before October 1, 1979.

Under the programs listed in § 95.1, we will pay a State for a State agency expenditure made before October 1, 1979, only if the State filed or files a claim with us for that expenditure before January 1, 1981. Section 95.19 lists the exceptions to this rule.

§ 95.11 Payment of claims subject to appropriations restrictions.

Notwithstanding any other provision of this Subpart, we will pay States' otherwise allowable claims for Federal financial participation under the programs covered by this Subpart, subject to the availability of funds (as provided in Acts appropriating funds to the Department in effect at the time in which such claims are being considered for payment), and subject to conditions or restrictions applicable to payments out of such funds, including provisions of the first and second continuing resolutions for FY 1981 (Pub. L. 96-369 and Pub. L. 96-536) and the Supplemental Appropriations and Rescission Act, 1981 (Pub. L. 97-12) that make funds under those Acts available to pay for a State agency expenditure made before September 30, 1978, only if the State had filed a claim for that expenditure with us within one year of the expenditure.

(Pub. L. 96-369, 94 Stat. 1351; Pub. L. 96-536, 94 Stat. 3166; and Pub. L. 97-12, 95 Stat. 14)

[46 FR 46136, Sept. 17, 1981]

§ 95.13 In which quarter we consider an expenditure made.

In this subpart—

(a) We consider a State agency's expenditure for assistance payments under title I, IV-A, IV-E, X, XIV, or XVI (AABD) to have been made in the quarter in which a payment was made to the assistance recipient, his or her protective payee, or a vendor payee, even if the payment was for a month in a previous quarter.

(b) We consider a State agency's expenditure for services under title I, IV-A, IV-B, IV-D, IV-E, X, XIV, XVI (AABD) or XIX to have been made in the quarter in which any State agency made a payment to the service provider.

(c) For purposes of title XX, the date of expenditure is governed by 45 CFR 1396.52(d).

(d) We consider a State agency's expenditure for administration or training under title I, IV-A, IV-B, IV-D, IV-E, X, XIV, XVI (AABD), or XIX to have been made in the quarter payment was made by a State agency to a private agency or individual; or in the quarter to which the costs were allocated in accordance with the regulations for each program. We consider a State agency's expenditure under these titles for non-cash expenditures such as depreciation to have been made in the quarter the expenditure was recorded in the accounting records of any State agency in accordance with generally accepted accounting principles.

§ 95.19 Exceptions to time limits.

The time limits in §§ 95.7 and 95.10 do not apply to any of the following—

(a) Any claim for an adjustment to prior year costs.

(b) Any claim resulting from an audit exception.

(c) Any claim resulting from a court-ordered retroactive payment.

(d) Any claim for which the Secretary decides there was good cause for the State's not filing it within the time limit.

§ 95.22 Meaning of good cause.

(a) Good cause for the late filing of a claim is lateness due to circumstances beyond the State's control.

(b) Examples of circumstances beyond the State's control include:

(1) Acts of God;

(2) Documented action or inaction of the Federal government.

(c) Circumstances beyond the State's control do not include neglect or administrative inadequacy on the part of the State, State agencies, the State legislature or any of their offices, officers, or employees.

§ 95.25 When to request a waiver for good cause.

The State should request a waiver in writing as soon as the State recognizes that it will be unable to submit a claim within the appropriate time limit.

§ 95.28 What a waiver request for good cause must include.

The State's request for waiver must include a specific explanation, justification or documentation of why the claim is or will be late. This request must establish that the lateness in filing the claim is for good cause as defined in § 95.22 and not due to neglect or administrative inadequacy. If the claim has not been filed, the State must also tell us when the claim will be filed.

§ 95.31 Where to send a waiver request for good cause.

(a) A request which affects the program(s) of only one HHS agency (the Health Care Financing Administration, or the Office of Child Support Enforcement, or the Office of Human Development Services, or the Social Security Administration) and does not affect the programs of any other agency or Federal Department should be sent to the appropriate HHS agency.

(b) A request which affects programs of more than one HHS agency or Federal Department should be sent to the Director, Division of Cost Allocation in the appropriate HHS Regional Office.

§ 95.34 The decision to waive the time limit for good cause.

The Secretary will make a decision after reviewing the State's request for waiver. If the Secretary decides that good cause exists, the State will be notified of the extended due date. If the Secretary decides that good cause does not exist or that the request for waiver does not provide enough information to make a decision, the State will be so advised.

Subparts B–E—[Reserved]

Subpart F—Automatic Data Processing Equipment and Services—Conditions for Federal Financial Participation

SOURCE: 43 FR 44853, Sept. 29, 1978, unless otherwise noted.

GENERAL

§ 95.601 Scope and applicability.

This subpart prescribes the conditions under which the Department of Health and Human Services will approve Federal financial participation (FFP), at the applicable rates, for the costs of automatic data processing incurred under an approved State plan for titles I, IV-A, IV-B, IV-C, IV-D, X XIV, XVI (AABD), XIX, or XX of the Social Security Act.

§ 95.605 Definitions.

"Acceptance documents" means written evidence of satisfactory completion of an approved phase of work or contract, and acceptance thereof by the State agency.

"Acquisition" means acquiring ADP equipment or services from commercial sources or from State or local government resources.

"Advance planning document" or "APD" means a written plan of action to acquire the proposed ADP services or equipment. The APD must contain a statement of needs and objectives; a preliminary cost/benefits analysis; a personnel resource statement indicating availability of qualified and adequate staff, including a project director to accomplish the project objectives; a detailed description of the nature and scope of the activities to be undertaken and the methods to be used to accomplish the project; a proposed activity schedule for the project; a proposed budget; and a statement indicating the period of time the State expects to use the ADP service or equipment.

"Approving component" means an organization within the Department that is authorized to approve requests for the acquisition of ADP equipment or ADP services; Social Security Administration (SSA) for cash assistance for titles I, IV-A, X, XIV, and XVI (AABD): Office of Human Development services (OHDS) for social services for titles I, IV-A, IV-B, IV-C, X, XIV, XVI (AABD), and XX; Office of Child Support Enforcement (OCSE) for title IV-D; and Health Care Financing Administration (HCFA) for title XIX of the Social Security Act.

"Automatic data processing" or "ADP" means data processing performed by a system of electronic or electrical machines so interconnected and interacting as to minimize the need for human assistance or intervention.

"Automatic data processing equipment" or "ADP equipment" means:

(a) Electronic digital computers, regardless of size, capacity, or price, that accept data input, store data, perform calculations, and other processing steps and prepare information output;

(b) All peripheral or auxiliary equipment used in support of electronic computers whether selected and acquired with the computer or separately;

(c) Data transmission or communications equipment that is selected and acquired solely or primarily for use with a configuration of ADP equipment which includes an electronic computer; and

(d) Data input equipment that is used to enter data directly or indirectly into an electronic digital computer; peripheral or auxiliary equipment; or data transmission or communications equipment.

"Automatic data processing services" or "ADP services" means:

(a) Services to operate ADP equipment, either by private sources, or by employees of the State agency, or by

State or local organizations other than the State agency; and/or

(b) Services provided by private sources or by employees of the State agency or by State and local organizations other than the State agency to perform such tasks as feasibility studies, system studies, system design efforts, development of system specifications, system analysis, programing and system implementation.

"Data processing" means the preparation of source media containing data or basic elements of information, and the use of such source media according to precise rules of procedures to accomplish such operations as classifying, sorting, calculating, summarizing, recording, and transmitting.

"Department" means the Department of Health and Human Services.

"Feasibility study" means a preliminary study to determine whether it is sufficiently probable that effective and efficient use of ADP equipment or systems can be made to warrant the substantial investment of staff, time, and money.

"FFP" means Federal financial participation.

"Service agreement" means a document signed by the State or local agency and the State or local central data processing facility providing ADP services (provider) which:

(a) Identifies those ADP services the central data processing facility will provide;

(b) Includes, preferably as an amendable attachment, a schedule of charges for each identified ADP service, and a certification that these charges apply equally to all users;

(c) Includes a description of the method(s) of accounting for the services rendered under the agreement and computing services charges;

(d) Includes assurances that services provided will be timely and satisfactory;

(e) Includes assurances that information in the computer system as well as access, use, and disposal of ADP data will be safeguarded in accordance with provisions of 45 CFR 205.50 and 45 CFR 302.18; and

(f) Requires the provider to obtain prior approval from the Department for ADP equipment and ADP services that is acquired primarily to support the titles covered by this subpart and requires the provider to comply with 45 CFR Part 74, Subpart P for procurements related to the service agreement.

"Software" means a set of computer programs, procedures, and associated documentation by which ADP equipment is used and operated.

"State agency" means the State agency administering or supervising the administration of the State plan that is required by the Department for the Social Security Act programs.

"System design" means the putting together of a new or more efficient ADP system.

"System specifications" means information about the new ADP system—such as workload descriptions, input data, information to be maintained and processed, data processing techniques, and output data—which is required to determine the ADP equipment and software necessary to implement the system design.

"System study" means the examination of existing information flow and operational procedures within an organization. The study essentially consists of three basic phases: data gathering, investigation of the present system and new information requirements; analysis of the data gathered in the investigation; and synthesis, or refitting of the parts and relationships uncovered through the analysis into an efficient system.

[43 FR 44853, Sept. 29, 1978, as amended at 45 FR 10794, Feb. 19, 1980]

SPECIFIC CONDITIONS FOR FFP

§ 95.611 Prior approval conditions.

(a) *General-Acquisition requirement.* A State shall obtain prior written approval from the Department when it plans to acquire ADP equipment or services that it anticipates will have total acquisition costs of $100,000 or more in Federal and State funds over a twelve-month period, or $200,000 or more in Federal or State funds for the total acquisition. A State shall also obtain prior written approval from the Department when it plans to acquire noncompetitively from a commercial source ADP equipment or services that cost more than $25,000 in Federal and State funds. The State shall submit requests for prior systems approval, signed by the appropriate State official, to the Assistant Secretary for Management and Budget (ASMB), Department of Health and Human Services. Requests from States shall indicate clearly the Social Security Act titles under which funding is requested, and the estimated amount or percent that is requested for each title. The State shall send three copies of the request for each component to the Department that must approve the request. The Department will acknowledge receipt of the State request.

(b) *Specific prior approval requirements.* The State agency shall obtain written approval of the Department:

(1) For the advance planning document or any change of the advance planning document prior to entering into contractual agreements or making any other commitment for acquisition of ADP equipment or ADP services;

(2) For the service agreement (when data processing services are to be provided by a State central data processing facility or by another State or local agency);

(3) For the request for proposal (RFP), prior to its issuance when service or equipment proposals are being solicited from commercial sources;

(4) When required, for the contract, prior to signature of the contracting officer. The Department requires approval of the contract for complex procurements, or where the grantee has a history of performance problems.

(5) When required for:

(i) The feasibility study;

(ii) The system study;

(iii) The system design;

(iv) The system specifications; and

(v) The acceptance document.

The Department will notify the State agency if such prior approval is required under § 95.611(b) (4) or (5).

(c) *Prompt action on requests for prior approval.* The ASMB will promptly send to the approving components the items specified in paragraph (b) of this section. If the Department has not communicated approval or disapproval within 30 days the ASMB or an approving component will notify the State regarding the status of the request.

[43 FR 44853, Sept. 29, 1978, as amended at 45 FR 10794, Feb. 19, 1980]

§ 95.612 Prior notice conditions.

(a) *General—$25,000 to $100,000 acquisition requirements.* A State shall notify the Department (ASMB) when it plans to acquire ADP equipment or services that will cost $25,000 to $100,000 over a twelve-month period in Federal and State funds. The State shall send the prior notice of acquisition to the Department 60 days before the planned acquisition.

(b) *Specific prior notice contents.* The prior notice of acquisition is signed by the appropriate State official and explains:

(1) The need the acquisition is intended to satisfy;

(2) The nature and scope of the acquisition;

(3) Alternatives to the acquisition;

(4) If acquired from commercial sources, assurance that the State or local government will competitively acquire the ADP equipment or service;

(5) Total cost of the acquisition;

(6) The Social Security Act titles the State intends to charge for the acquisition and the estimated amount or percentages the State plans to charge to each title; and

(7) Any additional information the Department requires.

[45 FR 10794, Feb. 19, 1980]

§ 95.613 Procurement standards.

Procurements of ADP equipment and services are subject to the procurement standards in Subpart P, 45 CFR, Part 74. Those standards include a requirement for maximum practical open and free competition regardless of whether the procurement is formally advertised or negotiated. Those standards, as well as the requirement for prior approval, apply to ADP services and equipment acquired by a State or local agency, and to ADP services and equipment acquired by a State or local central data processing facility primarily to support the Social Security Act programs covered by this subpart. The service agreement between the State agency and the State central data processing facility is exempt from the procurement standards because State and local government agencies are not required to compete with the private sector.

[43 FR 44853, Sept. 29, 1978; 43 FR 53039, Nov. 15, 1978, as amended at 45 FR 10794, Feb. 19, 1980]

§ 95.615 Access to records.

In accordance with 45 CFR Part 74, the State agency must allow the Department access to the system in all of its aspects, including design developments, operation, and cost records of contractors and subcontractors at such intervals as are deemed necessary by the Department to determine whether the conditions for approval are being met and to determine the efficiency, economy and effectiveness of the system.

[43 FR 44853, Sept. 29, 1978, as amended at 45 FR 10794, Feb. 19, 1980]

§ 95.617 Software and ownership rights.

(a) *General.* The State or local government will have all ownership rights in software or modifications thereof and associated documentation designed, developed or installed with Federal financial participation under this subpart.

(b) *Exemption.* The Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use for Federal Government purposes, such software, modifications, and documentation.

(c) *Proprietary software.* Proprietary software which is provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisions of this subpart.

[43 FR 44853, Sept. 29, 1978, as amended at 45 FR 10794, Feb. 19, 1980]

§ 95.619 Use of ADP systems.

ADP systems designed, developed, or installed with Federal financial participation shall be used for a period of time specified in the advance planning document, unless the Department determines that the elapsed shorter period of time is sufficient to justify the Federal funds invested.

[43 FR 44853, Sept. 29, 1978, as amended at 45 FR 10794, Feb. 19, 1980]

§ 95.621 ADP reviews.

The Department will conduct periodic onsite surveys and reviews of State and local agency ADP methods and practices to determine the adequacy of such methods and practices and to assure that ADP equipment and services are utilized for the purposes consistent with proper and efficient administration under the Act. Where practical, the Department will develop a mutually acceptable schedule between the Department and State or local agencies prior to conducting such surveys or reviews, which may include but are not limited to:

(a) *Pre-installation readiness.* A pre-installation survey including an onsite evaluation of the physical site and the agency's readiness to productively use the proposed ADP services, equipment or system when installed and operational.

(b) *Post-installation.* A review conducted after installation of ADP equipment or systems to assure that the objectives for which FFP was approved are being accomplished.

(c) *Utilization.* A continuing review of ADP facilities to determine whether or not the ADP equipment or services are being efficiently utilized in support of approved programs or projects.

§ 95.623 Waiver of prior approval requirements.

ADP equipment and services acquired by a State agency prior to the effective date of these regulations may qualify for FFP provided the Department waives the prior approval requirement. The Department will waive the prior approval requirement when it determines that the ADP equipment or services would have received prior approval had a request for such approval been made by the State agency.

COST ALLOCATION PLAN

§ 95.631 Relationship to the approved cost allocation plan.

(a) *General.* The conditions of this subpart apply notwithstanding the existence of an approved cost allocation plan. States that operate with a central data processing facility shall use the approved cost allocation plan billing rates and billing methods in the service agreement with the State agency. The State shall bill the Department, at the approved rates, for the ADP equipment and services used by the individual Department programs.

(b) *Impact on the cost allocation plan.* ADP equipment and services purchased or leased by the State central data processing facility may cause a change to the approved cost allocation plan. (For example, the lease of an additional nondedicated computer.) When a change is necessary, the State shall revise the billing rates and billing methods prior to revising the service agreement.

§ 95.633 Nondiscrimination requirements.

State agencies that acquire ADP equipment and services are subject to the nondiscrimination requirements in Parts 80, 84, and 90.

[45 FR 10794, Feb. 19, 1980]

EXEMPTIONS

§ 95.641 Exemption from 45 CFR 205.160(a) and 304.24.

The capitalization and depreciation provisions of 45 CFR 205.160(a) and 304.24 do not apply to ADP equipment provided the purchase benefits the Department and provided the Department agrees to the ADP equipment purchase.

§ 95.643 Exemption from 45 CFR Part 74, Appendix C, Part II, C.1.

The requirement in 45 CFR Part 74, Appendix C, Part II, C.1. for prior approval of ADP equipment and services is waived for items that cost $25,000 or less.

PART 96—BLOCK GRANTS

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AUTHORITY: Pub. L. 97-35, secs. 671-682, 901, 2191-94, 2351-55, 2601-11.

SOURCE: 46 FR 48587, Oct. 1, 1981, unless otherwise noted.

Subpart A—Introduction

§ 96.1 Scope.

This part applies to the following block grant programs:

(a) Community services (Pub. L. 97-35, secs. 671-682).

(b) Preventive health and health services (Pub. L. 97-35, sec. 901).

(c) Alcohol and drug abuse and mental health services (Pub. L. 97-35, sec. 901).

(d) Primary care (Pub. L. 97-35, sec. 901).

(e) Maternal and child health services (Pub. L. 97-35, secs. 2191-94).

(f) Social services (Pub. L. 97-35, secs. 2351-55).

(g) Low-income home energy assistance (Pub. L. 97-35, secs. 2601-11).

§ 96.2 Definitions.

(a) "Secretary" means the Secretary of Health and Human Services or his designee.

(b) "Department" means the Department of Health and Human Services.

(c) "Reconciliation Act" means the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35).

Subpart B—General Procedures

§ 96.10 Prerequisites to obtain block grant funds.

No particular form is required for a State's application or the related submission required by statute. The provisions in section 1742(a) of the Reconciliation Act relating to the contents of a report on proposed uses of funds must be satisfied; the specified information should be included in the plan required for the community services block grant (section 675(d) of the Reconciliation Act) and in the description of intended uses of funds required for the preventive health and health services, and alcohol and drug abuse and mental health services block grants (sections 1905(d) and 1915(d) of the Public Health Service Act (as amended by the Reconciliation Act) respectively).

§ 96.11 Basis of award to the States.

The Secretary will award the block grant funds allotted to the State in accordance with the apportionment of funds from the Office of Management and Budget. Such awards will reflect amounts reserved for Indian Tribes and Tribal Organizations and, in FY 1982, any amounts awarded by the Department under transition authorities. The grant award constitutes the authority to carry out the program and to draw and expend funds.

§ 96.12 Grant payment.

The Secretary will make payments at such times and in such amounts to each State from its awards in advance in accordance with section 203 of the Intergovernmental Cooperation Act (42 U.S.C. 4213) and Treasury Circular No. 1075 (31 CFR Part 205). When matching funds are involved, the Secretary shall take into account the ratio that such payment bears to such State's total expenditures under its awards.

§ 96.13 Reallotments.

The Secretary will re-allot to eligible States those funds available as of September 1 of each fiscal year under the reallotment provisions pertaining to the alcohol and drug abuse and mental health services, maternal and child health services, and preventive health and health services block grants. The reallotment procedure for the low-income home energy assistance block grant is specified in section 2607 of the Reconciliation Act and § 96.81 of this part.

§ 96.14 Time period for obligation of grant funds.

Amounts unobligated by the State at the end of a fiscal year shall remain available for obligation during the succeeding fiscal year for all block grants except:

(a) *Primary care.* Amounts are available only if the Secretary determines that the State acted in accordance with section 1926(a)(1) of the Public Health Service Act and there is good cause for funds remaining unobligated.

(b) *Low-income home energy assistance.* Amounts are available only in accordance with section 2607(b)(2) of the Reconciliation Act, which limits the amount to 25 percent of the amount allotted to the State for the prior fiscal year.

§ 96.15 Waivers.

Applications for waivers that are permitted by statute for the block grants should be submitted to the Assistant Secretary of Health in the case of the preventive health and health services, alcohol and drug abuse and mental health services, primary care, and maternal and child health services block grants; to the Assistant Secretary for Human Development Services in the case of the community services and social services block grants; and to the Associate Commissioner for Family Assistance in the case of the low-income home energy assistance program.

Subpart C—Financial Management

§ 96.30 Fiscal and administrative requirements.

Except where otherwise required by Federal law or regulation, a State shall expend block grant funds in accordance with the laws and procedures applicable to the expenditure of its own revenues. Fiscal control and accounting procedures must be sufficient to (a) permit preparation of reports required by the statute authorizing the block grant and (b) permit the tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of the statute authorizing the block grant.

Subpart D—Direct Funding of Indian Tribes and Tribal Organizations

§ 96.40 Scope.

This subpart applies to the community services, alcohol and drug abuse and mental health services, preventive health and health services, primary care, and low-income home energy assistance block grants.

§ 96.41 General determination.

The Secretary has determined that Indian tribes and tribal organizations would be better served by means of grants provided directly by the Secretary to such tribes and organizations out of the State's allotment of block grant funds than if the State were awarded its entire allotment. Accordingly, where provided for by statute, the Secretary will, upon request of an eligible Indian tribe or tribal organization, reserve a portion of a State's allotment and, upon receipt of the complete application and related submission that meets statutory requirements, grant it directly to the tribe or organization.

§ 96.42 General procedures and requirements.

(a) An Indian tribe or tribal organization applying for or receiving direct funding from the Secretary under a block grant program shall be subject to all statutory and regulatory requirements applicable to a State applying for or receiving block grant funds to the extent that such requirements are relevant to an Indian tribe or tribal organization except where otherwise provided by statute or in this Part.

(b) A tribal organization representing more than one Indian tribe will be eligible to receive block grant funds on behalf of a particular tribe only if the tribe has by resolution authorized the organization's action.

(c) If an Indian tribe or tribal organization whose service population resides in more than one State applies for block grant funds that, by statute, are apportioned on the basis of population, the allotment awarded to the tribe or organization shall be taken from the allotments of the various States in which the service population resides in proportion to the number of eligible members or households to be served in each State. If block grant funds are required to be apportioned on the basis of grants during a base year, the allotment to the Indian tribe or tribal organization shall be taken from the allotment of the State whose base year grants included the relevant grants to the tribe or organization.

(d) The audit required under the block grant programs shall be conducted by an entity that is independent of the Indian tribe or tribal organization receiving grant funds from the Secretary.

(e) Beginning with fiscal year 1983, any request by an Indian tribe or tribal organization for direct funding by the Secretary must be submitted to the Secretary, together with the required application and related materials, by September 1 preceding the Federal fiscal year for which funds are sought. A separate application is required for each block grant.

§ 96.43 Procedures during FY 1982.

(a) This section applies to the fiscal year beginning October 1, 1981.

(b) Except under the low-income home energy assistance program, an Indian tribe or tribal organization may receive direct funding from the Secretary only with respect to those block grants for which the State in which the tribe or organization is located has qualified for funds.

(c) A request for direct funding must be received by the Secretary before the Secretary has awarded all of the allotment to the State involved. The application and related submission may be submitted later but must be submitted within 75 days after the beginning of the quarter in which the state qualified for block grant funds, except that the application and related submission for the low-income home energy assistance program must be submitted by December 15, 1981. A separate request and application are required for each block grant.

§ 96.44 Community Services.

(a) This section applies to direct funding of Indian tribes and tribal organizations under the community services block grant.

(b) For purposes of section 674(c)(5) of the Reconciliation Act, an organized group of Indians is eligible for direct funding based on State recognition only if the State has expressly determined that the group is an Indian tribe or tribal organization in accordance with State procedures for making such determinations.

(c) For purposes of section 674(c)(2) of the Reconciliation Act, an "eligible Indian" means a member of an Indian tribe whose income is at or below the poverty line defined in section 673(2) of the Reconciliation Act. An "eligible individual" under section 674(c)(2) means a resident of the State whose income is at or below the poverty line.

(d) An Indian tribe or tribal organization is not required to comply with section 675(b) or to provide the certifications required by the following other provisions of the Reconciliation Act:

(1) Section 675(c)(2)(A);
(2) Section 675(c)(3); and
(3) Section 675(c)(4).

§ 96.45 Preventive health and health services.

(a) This section applies to direct funding of Indian tribes and tribal organizations under the preventive health and health services block grant.

(b) For the purposes of determining eligible applicants under section 1902(d) of the Public Health Service Act, a grantee that received a grant directly from the Secretary in FY 1981 under any of the programs replaced by the preventive health and health services block grant that was specifically targeted toward serving a particular Indian tribe or tribal organization will be considered eligible if the grantee is an Indian tribe or tribal organization at the time it requests funds under this part. Grantees that received funds under formula or Statewide grants, and subgrantees that received funds from any program replaced by the preventive health and health services block grant, are not eligible.

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§ 96.46 Alcohol and drug abuse and mental health services.

(a) This section applies to direct funding of Indian tribes and tribal organizations under the alcohol and drug abuse and mental health services block grant.

(b) For the purpose of determining eligible applicants under section 1912(c) of the Public Health Service Act, an entity that received a treatment grant or contract directly from the Secretary in FY 1980 specifically targeted toward serving a particular Indian tribe or tribal organization will be considered eligible if the entity is an Indian tribe or tribal organization at the time it requests funds under this part. Entities that received funds under formula or statewide grants, and those grantees who had the responsibility for their treatment grant support transferred to the Indian Health Service, are not eligible.

(c) An Indian tribe or tribal organization is not required to comply with section 1915(b) or to provide the certifications required by section 1915 (c)(2) through (c)(8) of the Public Health Service Act. Also, the services identified in section 1914(a)(1) of the Public Health Service Act need not be provided by means of grants to community mental health centers.

§ 96.47 Primary care.

Applications for direct funding of Indian tribes and tribal organizations under the primary care block grant must comply with 42 CFR Part 51c (Grants for Community Health Services).

§ 96.48 Low-income home energy assistance.

(a) This section applies to direct funding of Indian tribes under the low-income home energy assistance program.

(b) The terms "Indian tribe" and "tribal organization" as used in the Reconciliation Act have the same meaning given such terms in section 4(b) and 4(c) of the Indian Self-Determination and Education Act (25 U.S.C. 4506), except that the terms shall also include organized groups of Indians that the State in which they reside has expressly determined are Indian tribes or tribal organizations in accordance with State procedures for making such determinations.

(c) The plan required by section 2604(c)(4) of the Reconciliation Act shall contain the certification and information required for States under section 2605 (b) and (c) of that Act. An Indian tribe or tribal organization is not required to comply with section 2605(a)(2) of the Act.

Subpart E—Enforcement

§ 96.50 Complaints.

(a) This section applies to any complaint that a State has failed to use its allotment under a block grant in accordance with the terms of the act establishing the block grant or the certifications and assurances made by the State pursuant to that act. The Secretary is not required to consider a complaint unless it is submitted as required by this section.

(b) Complaints with respect to the preventive health and health services, alcohol and drug abuse and mental health services, primary care, and maternal and child health services block grants shall be submitted in writing to the Assistant Secretary of Health. Complaints with respect to the community services and social services block grants shall be submitted in writing to the Assistant Secretary for Human Development Services. Complaints with respect to the low-income home energy assistance program shall be submitted to the Commissioner of Social Security. (The address in each case is 200 Independence Ave. SW., Washington, D.C. 20201.) The complaint must identify the provision of the act, assurance, or certification that was allegedly violated; must specify the basis for the violations it charges; and must include all relevant information known to the person submitting it.

(c) The Department shall promptly furnish a copy of any complaint to the affected State. Any comments received from the State within 60 days (or such longer period as may be agreed upon between the State and the Department) shall be considered by the Department in responding to the complaint. The Department will conduct an investigation of complaints where appropriate.

(d) The Department will provide a written response to complaints within 180 days after receipt. If a final resolution cannot be provided at that time, the response will state the reasons why additional time is necessary.

(e) In resolving any issue raised by a complaint or a Federal audit, the Department will defer to a State's interpretation of its assurances and of the provisions of the block grant statutes unless the interpretation is clearly erroneous. In any event, the Department will provide copies of complaints to the independent entity responsible for auditing the State's activities under the block grant program involved. Any determination by the Department that a State's interpretation is not clearly erroneous shall not preclude or otherwise prejudice the State auditors' consideration of the question.

§ 96.51 Hearings.

(a) The Department will order a State to repay amounts found not to have been expended in accordance with law or the certifications provided by the State only after the Department has provided the State an opportunity for a hearing. The hearing will be governed by Subpart F of this part and will be held in the State if required by statute.

(b) If a State refuses to repay amounts after a final decision that is not subject to further review in the Department, the amounts may be offset against payments to the State. If a statute requires an opportunity for a hearing before such an offset may be made, the hearing will be governed by Subpart F of this part and will be held in the State if required by statute.

(c) The Department will withhold funds from a State only if the Department has provided the State an opportunity for a hearing. The hearing will be governed by Subpart F of this part and will be held in the State if required by statute.

§ 96.52 Appeals.

(a) Decisions resulting from repayment hearings held pursuant to § 96.51(a) of this part may be appealed by either the State or the Department to the Grant Appeals Board.

(b) Decisions resulting from offset hearings held pursuant to § 96.51(b) of this part may not be appealed.

(c) Decisions resulting from withholding hearings held pursuant to § 96.51(c) of this part may be appealed to the Secretary by the State or the Department as follows:

(1) An application for appeal must be received by the Secretary no later than 60 days after the appealing party receives a copy of the presiding officer's decision. The application shall clearly identify the questions for which review is sought and shall explain fully the party's position with respect to those questions. A copy shall be furnished to the other party.

(2) The Secretary may permit the filing of opposing briefs, hold informal conferences, or take whatever other steps the Secretary finds appropriate to decide the appeal.

(3) The Secretary may refer an application for appeal to the Grant Appeals Board. Notwithstanding Part 16 of this title, in the event of such a referral, the Board shall issue a recommended decision that will not become final until affirmed, reversed, or modified by the Secretary.

(d) Any appeal to the Grant Appeals Board under this section shall be governed by Part 16 of this title except that the Board shall not hold a hearing. The Board shall accept any findings with respect to credibility of witnesses made by the presiding officer. The Board may otherwise review and supplement the record as provided for in Part 16 of this title and decide the issues raised.

Subpart F—Hearing Procedure

§ 96.60 Scope.

The procedures in this subpart apply when opportunity for a hearing is provided for by § 96.51 of this part.

§ 96.61 Initiation of hearing.

(a) A hearing is initiated by a notice of opportunity for hearing from the Department. The notice will:

(1) Be sent by mail, telegram, telex, personal delivery, or any other mode of written communication;

(2) Specify the facts and the action that are the subject of the opportunity for a hearing;

(3) State that the notice of opportunity for hearing and the hearing are governed by these rules; and

(4) State the time within which a hearing may be requested, and state the name, address, and telephone number of the Department employee to whom any request for hearing is to be addressed.

(b) A State offered an opportunity for a hearing has the amount of time specified in the notice, which may not be less than 10 days after receipt of the notice, within which to request a hearing. The request may be filed by mail, telegram, telex, personal delivery, or any other mode of written communication, addressed to the designated Department employee. If no response is filed within that time, the offer is deemed to have been refused and no hearing will be held.

(c) If a hearing is requested, the Department will designate a presiding officer, and (subject to § 96.51 of this part) the hearing will take place at a time and location agreed upon by the State requesting the hearing, the Department, and the presiding officer or, if agreement cannot be reached, at a reasonable time and location designated by the presiding officer.

§ 96.62 Presiding officer.

(a) A Department employee to whom the Secretary delegates such authority, or any other agency employee designated by an employee to whom such authority is delegated, may serve as the presiding officer and conduct a hearing under this subpart.

(b) The presiding officer is to be free from bias or prejudice and may not have participated in the investigation or action that is the subject of the hearing or be subordinate to a person, other than the Secretary, who has participated in such investigation or action.

(c) The Secretary is not precluded by this section from prior participation in the investigation or action that is the subject of the hearing.

(d) A different presiding officer may be substituted for the one originally designated under § 96.61 of this part without notice to the parties.

§ 96.63 Communications to presiding officer.

(a) Those persons who are directly involved in the investigation or presentation of the position of the Department or any party at a hearing that is subject to this subpart should avoid any off-the-record communication on the matter to the presiding officer or his advisers if the communication is inconsistent with the requirement of § 96.68 of this part that the administrative record be the exclusive record for decision. If any communication of this type occurs, it is to be reduced to writing and made part of the record, and the other party provided an opportunity to respond.

(b) A copy of any communications between a participant in the hearing and the presiding officer, e.g., a response by the presiding officer to a request for a change in the time of the hearing, is to be sent to all parties by the person initiating the communication.

§ 96.64 Intervention.

Participation as parties in the hearing by persons other than the State and the Department is not permitted.

§ 96.65 Discovery.

The use of interrogatories, depositions, and other forms of discovery shall not be allowed.

§ 96.66 Hearing procedure.

(a) A hearing is public, except when the Secretary or the presiding officer determines that all or part of a hearing should be closed to prevent a clearly unwarranted invasion of personal privacy, to prevent the disclosure of a trade secret or confidential commercial or financial information, or to protect investigatory records compiled for law enforcement purposes that are not available for public disclosure.

(b) A hearing wil be conducted by the presiding officer. Employees of the Department will first give a full and complete statement of the action which is the subject of the hearing, together with the information and reasons supporting it, and may present any oral or written information relevant to the hearing. The State may then present any oral or written information relevant to the hearing. Both parties may confront and conduct reasonable cross-examination of any person (except for the presiding officer and counsel for the parties) who makes any statement on the matter at the hearing.

(c) The hearing is informal in nature, and the rules of evidence do not apply. No motions or objections relating to the admissibility of information and views will be made or considered, but either party may comment upon or rebut all such data, information, and views.

(d) The presiding officer may order the hearing to be transcribed. The State may have the hearing transcribed, at the State's expense, in which case a copy of the transcript is to be furnished to the Department at the Department's expense.

(e) The presiding officer may, if appropriate, allow for the submission of post-hearing briefs. The presiding officer shall prepare a written decision, which shall be based on a preponderance of the evidence, shall include a statement of reasons for the decision, and shall be final unless appealed pursuant to § 96.52 of this part. If post-hearing briefs were not permitted, the parties to the hearing will be given the opportunity to review and comment on the presiding officer's decision prior to its being issued.

(f) The presiding officer shall include as part of the decision a finding on the credibility of witnesses (other than expert witnesses) whenever credibility is a material issue.

(g) The presiding officer shall furnish a copy of the decision to the parties.

(h) The presiding officer has the power to take such actions and make such rulings as are necessary or appropriate to maintain order and to conduct a fair, expeditious, and impartial hearing, and to enforce the requirements of this subpart concerning the conduct of hearings. The presiding officer may direct that the hearing be conducted in any suitable manner permitted by law and these regulations.

(i) The Secretary or the presiding officer has the power to suspend, modify, or waive any provision of this subpart.

§ 96.67 Right to counsel.

Any party to a hearing under this part has the right at all times to be advised and accompanied by counsel.

§ 96.68 Administrative record of a hearing.

(a) The exclusive administrative record of the hearing consists of the following:

(1) The notice of opportunity for hearing and the response.

(2) All written information and views submitted to the presiding officer at the hearing or after if specifically permitted by the presiding officer.

(3) Any transcript of the hearing.

(4) The presiding officer's decision and any briefs or comments on the decision under § 96.66(e) of this part.

(5) All letters or communications between participants and the presiding officer or the Secretary referred to in § 96.63 of this part.

(b) The record of the hearing is closed to the submission of information and views at the close of the hearing, unless the presiding officer specifically permits additional time for a further submission.

Subpart G—Social Services Block Grants

§ 96.70 Scope.

This subpart applies to the social services block grant.

§ 96.71 Definitions.

(a) Section 2005 (a)(2) and (a)(5) of the Social Security Act establishes prohibitions against the provision of room and board and medical care unless they are an "integral but subordinate" part of a State-authorized social service. "Integral but subordinate" means that the room and board or medical care is a minor but essential adjunct to the service of which it is a part and is necessary to achieve the objective of that service. Room and board shall not be considered an integral but subordinate part of a service when it is provided to an individual in a foster family home or other facility the primary purpose of which is to provide food, shelter, and care or supervision, except for temporary emergency shelter provided as a protective service.

(b) As used in section 2005(a)(5) of the Social Security Act with respect to the limitations governing the provision of services by employees of certain institutions, "employees" includes staff, contractors, or other individuals whose activities are under the professional direction or direct supervision of the institution.

§ 96.72 Transferability of funds.

Under section 2002(d) of the Social Security Act, funds may be transferred in accordance with the provisions of that section to the preventive health and health services, alcohol and drug abuse and mental health services, primary care, maternal and child health services, and low-income home energy assistance block grants. In addition, funds may be transferred to other Federal block grants for support of health services, health promotion and disease prevention activities, or low-income home energy assistance (or any combination of those activities).

Subpart H—Low-Income Home Energy Assistance Program

§ 96.80 Scope.

This subpart applies to the low-income home energy assistance program.

§ 96.81 Reallotment report.

As part of the reallotment procedure established by section 2607 of the Reconciliation Act, each recipient of funds must submit a report to the Secretary by August 1 of each year containing the following information:

(a) The amount of the State's original allotment that the State desires to remain available for expenditure in the succeeding fiscal year, not to exceed 25 percent of the original allotment; and

(b) The amount of funds, if any, to be subject to reallotment.

§ 96.82 Required report.

In accordance with the authority in section 2610(a) of the Reconciliation Act, each State receiving funds shall submit to the Department by October 31 of each year a report of the number and income levels of the households assisted by the funds.

§ 96.83 Request for direct Federal payments to SSI recipients.

A State that wants the Secretary to make direct payments from the State's allotment to recipients of Supplemental Security Income in accordance with section 2604(e) of the Reconciliation Act must submit such a request by November 2, 1981. Such a request may be withdrawn at any time. If such a request is not in effect, a State may request the Secretary to make direct payments in any fiscal year by submitting a request by September 1 of the preceding fiscal year.

§ 96.84 Territories.

Except as otherwise provided, a territory eligible for funds shall have the same rights and responsibilities as a State.

Subpart I—Community Services Block Grants

§ 96.90 Scope.

This subpart applies to the community services block grant.

§ 96.91 Audit requirement.

Pursuant to section 1745(b) of the Reconciliation Act, an audit is required with respect to the 2-year period beginning on October 1, 1981, and with respect to each 2-year period thereafter. In its application for funds, a State may modify the assurance required by section 675(c)(9) of the Reconciliation Act to conform to the requirements of section 1745(b).

Subpart J—Transition Provisions

§ 96.100 Scope.

Except as otherwise stated, this subpart applies to the community services, preventive health and health services, alcohol and drug abuse and mental health services, and maternal and child health services block grants for the fiscal year beginning October 1, 1981.

§ 96.101 Continuation of pre-existing regulations.

The regulations previously issued by the Department and the Community Services Administration to govern administration of the programs replaced by the block grants specified in § 96.1 of this part shall continue in effect, until revised, to govern administration of those programs by the Department in those circumstances in which States have not qualified for block grants.

§ 96.102 Community services block grant.

(a) For the fiscal year beginning October 1, 1981, only, a State may choose to operate programs under the community services block grant or, instead, have the Secretary operate the programs replaced by the block grant. If a State does not notify the Secretary in accordance with the statutory deadlines each quarter, it will be deemed to have requested the Secretary to operate the programs for the following quarter.

(b) For any quarter in which the Secretary administers the programs, the Department's administration costs will be deducted from the State's allotment. The Department's total administration costs for making grants during fiscal year 1982 and for any monitoring of these grants in fiscal year 1983 will be deducted from each State's allotment in proportion to the total amount of grants awarded from the allotment during the period of administration by the Department (but not to exceed 5 percent of the State's FY 1982 allotment).

PART 99—PRIVACY RIGHTS OF PARENTS AND STUDENTS

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AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g).

SOURCE: 41 FR 24670, June 17, 1976, unless otherwise noted.

Subpart A—General

§ 99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]

(20 U.S.C. 1230, 1232g)

(b) This part does not apply to an educational agency or institution solely because students attending that non-monetary agency or institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the agency or institution itself.

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(20 U.S.C. 1232g)

(d) Except as otherwise specifically provided, this part applies to education records of students who are or have been in attendance at the educational agency or institution which maintains the records.

(20 U.S.C. 1232g)

§ 99.2 Purpose.

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(20 U.S.C. 1232g)

§ 99.3 Definitions.

As used in this Part:

"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247 as amended.

"Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program.

"Commissioner" means the U.S. Commissioner of Education.

(20 U.S.C. 1232g)

"Directory information" includes the following information relating to a student: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

(20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

(20 U.S.C. 1232g(b)(1))

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in § 99.1(a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution.

(20 U.S.C. 1232g(a)(3))

"Education records" (a) means those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:

(i) Are in the sole possession of the maker thereof, and

(ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a "substitute" means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position.

(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition;

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided,* That education records maintained by the educational agency or institution are not disclosed to the personnel of the law enforcement unit.

(3)(i) Records relating to an individual who is employed by an educational agency or institution which:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee, and

(C) Are not available for use for any other purpose.

(ii) This paragraph does not apply to records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.

(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment; *Provided,* That the records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities which are part of the program of instruction at the educational agency or institution.

(5) Records of an educational agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution. An example would be information collected by an educational agency or institution pertaining to the accomplishments of its alumni.

(20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of postsecondary education.

(20 U.S.C. 1232g(d))

"Financial Aid", as used in § 99.31(a)(4), means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution.

(20 U.S.C. 1232g(b)(1)(D))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law.

(20 U.S.C. 1232g(d))

"Panel" means the body which will adjudicate cases under procedures set forth in §§ 99.65–99.67.

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

"Party" means an individual, agency, institution or organization.

(20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

(20 U.S.C. 1232g)

"Record" means any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche.

(20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health and Human Services.

(20 U.S.C. 1232g)

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.

(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

(20 U.S.C. 1232g(a)(5))

§ 99.4 Student rights.

(a) For the purposes of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

(b) The status of an eligible student as a dependent of his or her parents for the purposes of § 99.31(a)(8) does not otherwise affect the rights accorded to and the consent required of the eligible student by paragraph (a) of this section.

(20 U.S.C. 1232g(d))

(c) Section 438 of the Act and the regulations in this part shall not be construed to preclude educational agencies or institutions from according to students rights in addition to those accorded to parents of students.

§ 99.5 Formulation of institutional policy and procedures.

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of—

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the student;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of education records maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent of the student or the eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least: (i) A statement of whether the educational agency or institution will disclose personally identifiable information from the education records of a student under § 99.31(a)(1) and, if so, a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest", and (ii) a specification of the personally identifiable information to be designated as directory information under § 99.37;

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

(5) Providing a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of a student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

(20 U.S.C. 1232g(e) and (f))

§ 99.6 Annual notification of rights.

(a) Each educational agency or institution shall give parents of students in attendance or eligible students in attendance at the agency or institution annual notice by such means as are reasonably likely to inform them of the following:

(1) Their rights under section 438 of the Act, the regulations in this part, and the policy adopted under § 99.5; the notice shall also inform parents of students or eligible students of the locations where copies of the policy may be obtained; and

(2) The right to file complaints under § 99.63 concerning alleged failures by the educational agency or institution to comply with the requirements of section 438 of the Act and this part.

(b) Agencies and institutions of elementary and secondary education shall provide for the need to effectively notify parents of students identified as having a primary or home language other than English.

(20 U.S.C. 1232g(e))

§ 99.7 Limitations on waivers.

(a) Subject to the limitations in this section and § 99.12, a parent of a student or a student may waive any of his or her rights under section 438 of the Act or this part. A waiver shall not be valid unless in writing and signed by the parent or student, as appropriate.

(b) An educational agency or institution may not require that a parent of a student or student waive his or her rights under section 438 of the Act or this part. This paragraph does not preclude an educational agency or institution from requesting such a waiver.

(c) An individual who is an applicant for admission to an institution of postsecondary education or is a student in attendance at an institution of postsecondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation described in § 99.12(a)(3) except that the waiver may apply to confidential letters and statements only if: (1) The applicant or student is, upon request, notified of the names of all individuals providing the letters or statements; (2) the letters or statements are used only for the purpose for which they were originally intended, and (3) such waiver is not required by the agency or institution as a condition of admission to or receipt of any other service or benefit from the agency or institution.

(d) All waivers under paragraph (c) of this section must be executed by the individual, regardless of age, rather than by the parent of the individual.

(e) A waiver under this section may be made with respect to specified classes of: (1) Education records, and (2) persons or institutions.

(f)(1) A waiver under this section may be revoked with respect to any actions occurring after the revocation.

(2) A revocation under this paragraph must be in writing.

(3) If a parent of a student executes a waiver under this section, that waiver may be revoked by the student at any time after he or she becomes an eligible student.

(20 U.S.C. 1232g(a)(1) (B) and (C))

§ 99.8 Fees.

(a) An educational agency or institution may charge a fee for copies of education records which are made for the parents of students, students, and eligible students under section 438 of the Act and this part; *Provided,* That the fee does not effectively prevent the parents and students from exercising their right to inspect and review those records.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(20 U.S.C. 1232g(a)(1))

Subpart B—Inspection and Review of Education Records

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the educational agency or institution to reasonable requests for explanations and interpretations of the records; and

(2) The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

(c) An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

(a) An institution of postsecondary education is not required by section 438 of the Act or this part to permit a student to inspect and review the following records:

(1) Financial records and statements of their parents or any information contained therein;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of a student prior to January 1, 1975; *Provided,* That:

(i) The letters and statements were solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality, and

(ii) The letters and statements are used only for the purposes for which they were specifically intended;

(3) Confidential letters of recommendation and confidential statements of recommendation which were placed in the education records of the student after January 1, 1975:

(i) Respecting admission to an educational institution;

(ii) Respecting an application for employment, or

(iii) Respecting the receipt of an honor or honorary recognition; *Provided,* That the student has waived his or her right to inspect and review those letters and statements of recommendation under § 99.7(c).

(20 U.S.C. 1232g(a)(1)(B))

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to that student.

(20 U.S.C. 1232g(a)(1)(A))

§ 99.13 Limitation on destruction of education records.

An educational agency or institution is not precluded by section 438 of the Act or this part from destroying education records, subject to the following exceptions:

(a) The agency or institution may not destroy any education records if there is an outstanding request to inspect and review them under § 99.11;

(b) Explanations placed in the education record under § 99.21 shall be maintained as provided in § 99.21(d), and

(c) The record of access required under § 99.32 shall be maintained for as long as the education record to which it pertains is maintained.

(20 U.S.C. 1232g(f))

Subpart C—Amendment of Education Records

§ 99.20 Request to amend education records.

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency or institution which maintains the records amend them.

(b) The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

(20 U.S.C. 1232g(a)(2))

§ 99.21 Right to a hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students. The hearing shall be conducted in accordance with § 99.22.

(b) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall amend the education records of the student accordingly and so inform the parent of the student or the eligible student in writing.

(c) If, as a result of the hearing, the educational agency or institution decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall inform the parent or eligible student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution.

(d) Any explanation placed in the education records of the student under paragraph (c) of this section shall:

(1) Be maintained by the educational agency or institution as part of the education records of the student as long as the record or contested portion thereof is maintained by the agency or institution, and

(2) If the education records of the student or the contested portion

thereof is disclosed by the educational agency or institution to any party, the explanation shall also be disclosed to that party.

(20 U.S.C. 1232g(a)(2))

§ 99.22 Conduct of the hearing.

The hearing required to be held by § 99.21(a) shall be conducted according to procedures which shall include at least the following elements:

(a) The hearing shall be held within a reasonable period of time after the educational agency or institution has received the request, and the parent of the student or the eligible student shall be given notice of the date, place and time reasonably in advance of the hearing;

(b) The hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing;

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney;

(d) The educational agency or institution shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(e) The decision of the agency or institution shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

(20 U.S.C. 1232g(a) (2))

Subpart D—Disclosure of Personally Identifiable Information From Education Records

§ 99.30 Prior consent for disclosure required.

(a) (1) An educational agency or institution shall obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in § 99.31.

(2) Consent is not required under this section where the disclosure is to (i) the parent of a student who is not an eligible student, or (ii) the student himself or herself.

(b) Whenever written consent is required, an educational agency or institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or purposes of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

(d) When a disclosure is made pursuant to paragraph (a) of this section, the educational agency or institution shall, upon request, provide a copy of the record which is disclosed to the parent of the student or the eligible student, and to the student who is not an eligible student if so requested by the student's parents.

[20 U.S.C. 1232g(b)(1) and (b)(2)(A))

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student

seeks or intends to enroll, subject to the requirements set forth in § 99.34;

(3) Subject to the conditions set forth in § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received; *Provided,* That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number or type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided,* That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided,* That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in § 99.36.

(b) This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section.

(20 U.S.C. 1232g(b)(1))

§ 99.32 Record of requests and disclosures required to be maintained.

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interests these parties had in requesting or obtaining the information.

(b) Paragraph (a) of this section does not apply:

(i) To requests by or disclosure to a parent of a student or an eligible student;

(ii) To requests by or disclosures to school officials under § 99.31(a)(1);

(iii) If there is written consent of a parent of a student or an eligible student, or

(iv) To requests for or disclosure of directory information under § 99.37.

(c) The record of requests and disclosures may be inspected;

(1) By the parent of the student or the eligible student,

(2) By the school official and his or her assistants who are responsible for the custody of the records, and

(3) For the purpose of auditing the recordkeeping procedures of the educational agency or institution by the parties authorized in, and under the conditions set forth in § 99.31(a)(1) and (3).

(20 U.S.C. 1232g(b)(4)(A))

[41 FR 24670, June 17, 1976, as amended at 42 FR 4460, Jan. 25, 1977]

§ 99.33 Limitation on redisclosure.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student, except that the personally identifiable information which is disclosed to an institution, agency or organization may be used by its officers, employees and agents, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not preclude an agency or institution from disclosing personally identifiable information under § 99.31 with the understanding that the information will be redisclosed to other parties under that section; *Provided,* That the recordkeeping requirements of § 99.32 are met with respect to each of those parties.

(c) An educational agency or institution shall, except for the disclosure of directory information under § 99.37, inform the party to whom a disclosure is made of the requirement set forth in paragraph (a) of this section.

(20 U.S.C. 1232g(b)(4)(B))

§ 99.34 Conditions for disclosure to officials of other schools and school systems.

(a) An educational agency or institution transferring the education records of a student pursuant to § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent of the student or the eligible student of the transfer of the records at the last known address of the parent or eligible student, except:

(i) When the transfer of the records is initiated by the parent or eligible student at the sending agency or institution, or

(ii) When the agency or institution includes a notice in its policies and procedures formulated under § 99.5 that it forwards education records on request to a school in which a student seeks or intends to enroll; the agency or institution does not have to provide any further notice of the transfer;

(2) Provide the parent of the student or the eligible student, upon request, with a copy of the education records which have been transferred; and

(3) Provide the parent of the student or the eligible student, upon request, with an opportunity for a hearing under Subpart C of this part.

(b) If a student is enrolled in more than one school, or receives services from more than one school, the schools may disclose information from the education records of the student to each other without obtaining the written consent of the parent of the student or the eligible student; *Provided,* That the disclosure meets the requirements of paragraph (a) of this section.

(20 U.S.C. 1232g(b)(1)(B))

§ 99.35 Disclosure to certain Federal and State officials for Federal program purposes.

(a) Nothing in section 438 of the Act or this part shall preclude authorized representatives of officials listed in § 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

(b) Except when the consent of the parent of a student or an eligible student has been obtained under § 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in § 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements. (20 U.S.C. 1232g(b)(3))

§ 99.36 Conditions for disclosure in health and safety emergencies.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) The factors to be taken into account in determining whether personally identifiable information from the education records of a student may be disclosed under this section shall include the following:

(1) The seriousness of the threat to the health or safety of the student or other individuals;

(2) The need for the information to meet the emergency;

(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section shall be strictly construed.

(20 U.S.C. 1232g(b)(1)(I))

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

(20 U.S.C. 1232g(a)(5) (A) and (B))

Subpart E—Enforcement

§ 99.60 Office and review board.

(a) The Secretary is required to establish or designate an office and a review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and the regulations in this part. The review board will adjudicate cases referred to it by the office under the procedures set forth in §§ 99.65-99.67.

(b) The following is the address of the office which has been designated under paragraph (a) of this section: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health and Human Services, 330 Independence Ave. SW., Washington, D.C. 20201.

(20 U.S.C. 1232g(g))

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§ 99.61 Conflict with State or local law.

An educational agency or institution which determines that it cannot comply with the requirements of section 438 of the Act or of this part because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part shall so advise the office designated under § 99.60(b) within 45 days of any such determination, giving the text and legal citation of the conflicting law.

(20 U.S.C. 1232g(f))

§ 99.62 Reports and records.

Each educational agency or institution shall (a) submit reports in the form and containing such information as the Office of the Review Board may require to carry out their functions under this part, and (b) keep the records and afford access thereto as the Office or the Review Board may find necessary to assure the correctness of those reports and compliance with the provisions of sections 438 of the Act and this part.

(20 U.S.C. 1232g(f) and (g))

§ 99.63 Complaint procedure.

(a) Complaints regarding violations of rights accorded parents and eligible students by section 438 of the Act or the regulations in this part shall be submitted to the Office in writing.

(b)(1) The Office will notify each complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the agency or institution under paragraph (b)(1) of this section shall include the substance of the alleged violation and the agency or institution shall be given an opportunity to submit a written response.

(c) (1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation the Office will provide written notification of its findings and the basis for such findings, to the complainant and the agency or institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (c)(2) of this section, the specific steps which must be taken by the agency or educational institution to bring the agency or institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the agency or institution to voluntarily comply.

(d) If the educational agency or institution does not come into compliance within the period of time set under paragraph (c)(3) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.64-99.67, inclusive.

(20 U.S.C. 1232g(f))

§ 99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (a) finds that an educational agency or institution has failed to comply with the provisions of section 438 of the Act, or the regulations in this part, and (b) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1(a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected by the failure to comply) until there is no longer any such failure to comply.

(20 U.S.C. 1232g(f))

§ 99.65 Hearing procedures.

(a) *Panels.* The Chairman of the Review Board shall designate Hearing Panels to conduct one or more hearings under § 99.64. Each Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The

Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) *Procedural rules.* (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by paragraph (b)(1)(ii) of this section, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(20 U.S.C. 1232g(g))

§ 99.66 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.65(b)(2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 1232g(g))

§ 99.67 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording the party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review the decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany that action with a written statement of the grounds for the modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon the decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational agency or institution involved or its attorney.

(20 U.S.C. 1232g(g))

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Subtitle B—Regulations Relating to Public Welfare

CHAPTER I—[RESERVED]

EDITORIAL NOTE: For a document issued by the Department of Education which redesignated and transferred the regulations in Title 45—Public Welfare, Chapter I (except Part 126), to Title 34—Education, see 45 FR 77368, November 21, 1980. Part 126 of Title 45 was redesignated and transferred to Title 42—Public Health, Part 60, at 46 FR 8519, January 27, 1981.

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FINDING AIDS

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80 Heading revised	17979
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123.12 (a)(1) and (d) revised; (h) added	†26517
123.12-1 Added	†26518
123.13 (b)(11) and (c) added	†26518
123.14 (a) and (b) revised; (c), (d), and (e) added	†26519
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177.1 (e) and (g) revised; (i) and (r) added	†7593
177.4 (c)(3)(xxi) added	36967
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123 Added	Δ23862
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160c Added	57935
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160f.12 (b)(5) and (c)(1) corrected	Δ9882
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174.100—174.103 (Subpart D-2) Added	Δ15693
174.110—174.115 (Subpart D-3) Added	Δ15694
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145 Removed....56506
146a Added....†20496
150 Removed....56506
151 Removed....56506
153 Revised....57288
162 Appendix A removed....†2630
163 Added....61227
  Removed....†35484
163a Added....61229
  Removed....†35484
164 Added; interim....†30278
166.61—166.67 (Subpart G) Removed....†35484
166.71—166.82 (Subpart H) Removed....†35484
167 Removed....56506
168.71—168.83 (Subpart H) Added....64567
  Revised....†34334
168.75 (b)(7) corrected....†6230
168.76 (b)(1)(iii), (2) and (6) corrected....†6230
168.80 (b) correctly designated and corrected; (c)(1) and (2) corrected....†6230
168.81 (b)(2)(ii) corrected....†6230
171.3 (c) revised....63575

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171.4—171.9 Redesignated as 171.5—171.10; new 171.4 added	63575
172 Added	†7530
172.63 (b) corrected	†11704
173 Revised	†35701
174 Removed	56506
175 Revised	†37925
175.13 Appendix A revised	†34146
176 Revised	†37943
176.13 Appendix A revised	†34146
177.12 (a)(1)(i) and (ii) revised; (a)(1)(xv) removed	†34338
177.15 Removed	†34338
177.43 (a) revised	†34338
178 Removed	56506
Added	61045
179 Added	†9248
180 Revised	†32379
181 Removed	56506
182 Revised	†18674
185.02 (n) and authority citations for (f)(2), (g), (i), (j), and (k) revised	†26016
185.11 (b)(6) and (c)(3) authority citations revised	†26016
185.12 (a)(12) amended; (a)(13), (14), and (15) and (e) added	†26016
185.13 (i) revised	†26016
185.21 (a) revised	†26016
185.22 (a) revised	†26017
185.23 Authority citation revised	†26017
185.31 (a)(1) and (b)(1) revised	†26017
185.33 Revised	†26017
185.45 Revised	†36251
185.51 (a) and (c) authority citation revised	†26017
185.52 (f) revised	†26017
185.61 (a) and (b)(5) authority citation revised	†26017
185.71 (a) revised	†26017
185.81 Revised	†26018
185.84 (b) revised	†26018
185.91 Revised	†26018
185.92 Revised	†26018
185.93 Revised	†26018
185.94 (a) revised	†26018
185.95—185.95-6 Undesignated center heading added	†26018
185.95 Redesignated into Subpart J and revised	†26018

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185.95-1—185.95-6 Added	†26018
185.101—185.110 (Subpart L) Redesignated as Subpart K	†26019
185.101—185.110 (Subpart K) Revised	†36230
189.11 (b) revised	57638
189.13 (b) revised	57638
189.14 Revised	57638
189.16 (a)(2) and (b)(1) revised	57639
189.21 (b)(9) revised	57639
190.31—190.39 (Subpart C) Appendix removed	†2631
190.32a (c), (e), and (f) revised; eff. 7-1-78 to 6-30-79	†3911
190.33 (b)(1) revised; eff. 7-1-78 to 6-30-79	†3911
190.35 (a)(2) revised; eff. 7-1-78 to 6-30-79	†3912
190.39 (a)(5) and (c) added; eff. 7-1-78 to 6-30-79	†3912
190.41—190.48 (Subpart D) Appendix removed	†2631
190.43 (b)(1) revised; eff. 7-1-78 to 6-30-79	†3912
190.48 (a)(6) and (c) added; eff. 7-1-78 to 6-30-79	†3912
190.51 (Subpart E) Appendix removed	†2631
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197 Added	†1765
198 Added	61232
199a Added	†21329

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5a Removed	Δ31981
13 Removed	50183
14 Removed	50183
16.53 Determination	Δ19248
19.4 (a) revised	Δ55877
20 Removed	Δ22727
25 Removed	Δ13028
46.103 (c)(5) and (6) amended; (c)(7) added	51559

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46.106 (b)(1) amended; (b)(3) through (6) redesignated as (b)(4) through (7); new (b)(3) added	53655
46.301 (Subpart C) Redesignated as 46.401 (Subpart D)	53655
46.301—46.306 (Subpart C) Added	53655
46.401 (Subpart D) Redesignated from 46.301 (Subpart C)	53655
57.206 Corrected	Δ32689
64.15—64.20 Corrected	54933, 58376
70 Removed; regulations transferred to 5 CFR Part 900 and revised	Δ8265
80 Appendix B added	Δ17164
84 Appendix B added	Δ17168
86 Appendix A added	Δ17168
90 Added	Δ33776
95.613 Corrected	53039
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100.10 (Subpart C) Added	57254
100a.29 (b)(3) correctly designated; CFR correction	46020
100a.80 Revised	57254
100a.81—100a.84 Removed	57255
100a.290 Removed	57255
100a.494 (b)(6) correctly designated; CFR correction	46020
100b.80 Revised	57255
100b.81—100b.84 Removed	57255
100e Added; interim	Δ30529
100—100d (Subchapter A) Appendixes A, B, C, and D removed	57255
105.606 (h) correctly designated	46020
105 Appendix B amended	57255
114.1 (a) redesignated as (a-1); new (a) and (w-1) added	Δ43439
114.5 (b) revised	Δ43440
116 Appendix removed	57255
116a.26 Interpretation	Δ39405
116d Revised	52678
117—119 Removed	57255
121 Removed	57255
121a Appendix A removed	57255
121d.40—121d.41 (Subpart B) Guidelines removed	57255
123 Authority citation revised; interim	Δ18908
123.12 (c) revised; (e) added; interim	Δ18908

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123.13 (c) revised; (f) added; interim	Δ18908
123.14 (b)(5)(i) and (10) revised; (b)(7)(iii)(D), and (11) through (14) added; interim	Δ18909
123.15 (a)(1)(i), (2)(ii)(D), (iii), (iv)(B), (3)(iii) and (v) revised; (a)(1)(iv), (2)(iv)(C), (vi), and (3)(vi) added; interim	Δ18909
123.16 Revised; interim	Δ18909
123.17 Revised; interim	Δ18910
123.31 (c) redesignated as (d) and revised; new (c) added; interim	Δ18910
123.32 Revised; interim	Δ18910
123.33 (b)(11) added; interim	Δ18910
123.35 Added; interim	Δ18910
123.43 (e) through (n) added; interim	Δ18911
124 Removed	57255
127 Removed	57255
129 Removed	57255
130 Revised	Δ23846
137 Added	55404
141 Removed	57255
142 Removed	57255
144 Redesignated as 174 and revised	Δ47454
144.2 Amended	Δ17903
146a.2 Existing text designated as (a); (b) added	Δ25820
146a.7 (b) added	Δ25820
154.6 (b)(7)(iii) correctly designated	49539
160 Removed	57255
162 Appendix B removed	57255
164 Revised	Δ40613
166 Appendices A and C removed	57255
168.11—168.21 (Subpart B) Added; eff. 11-8-79	Δ56281
168.31—168.37 (Subpart C) Added; eff. 11-8-79	Δ56285
169 Revised	Δ19135
170 Removed	57255
171 Removed	57255
174 Redesignated from 144 and revised	Δ47454
175 Revised	Δ47477
175.2 Amended	Δ17904
176 Revised	Δ47494
176.2 Amended	Δ17904

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180.13 (b) corrected.......... 46020
180.20 (b) corrected.......... 46021
180.33 (a)(2) corrected.......... 46020
180.38 Correctly designated........ 46021
180.57 (a) corrected.......... 46020
180.63 Corrected.......... 46021
185.74 (c)(2) revised.......... Δ48692
185.200—185.207 (Subpart L) Added.......... Δ31017
186 Interpretation.......... Δ18498
190.1—190.10 (Subpart A) Revised.......... Δ5260
190.11—190.16 (Subpart B) Revised.......... Δ5264
190.31—190.39 (Subpart C) Revised.......... Δ17899
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190.42 Amended.......... Δ31112
190.44 (b)(1) table amended...... Δ31112
190.45 Revised.......... Δ31112
190.51—190.55 (Subpart E) Revised.......... Δ5264
190.61—190.67 (Subpart F) Revised.......... Δ5265
190.64 (b)(2) corrected.......... Δ9388
190.71—190.85 (Subpart G) Revised.......... Δ5266
190.91—190.96 (Subpart H) Added.......... Δ5269
199a Heading revised.......... Δ27994
199a.1 (a) introductory text amended.......... Δ27994

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1 Added.......... 61598
3 Revised.......... *41820
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64 Removed; regulations transferred to 34 CFR Part 64.......... *53413
71 Revised; eff. in part 4-1-81... *17881
71.64 Corrected.......... *46808
71.66 Corrected.......... *54765
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74.20 Revised.......... *37667
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74.24 (c) removed.......... *37667
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74.25 Amended.......... *37667
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74.60 Revised.......... *35329
74.61 Heading and (h) revised... *35329
74.62 Added.......... *35329
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74.96 Revised.......... *37667
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74.160—74.164 (Subpart P) Revised *37667
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74.170 Revised.......... *34273
74.171 Revised.......... *34273
74.172 Revised.......... *34273
74.175 (a) revised.......... *34273
74 Appendixes C and D removed.......... *34274
Appendixes G and H added...... *37668
Effective date and text corrected.......... *38380
80 Interpretations.......... 58510
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82 Removed.......... 58912
86 Policy interpretation.......... 71413
90 Effective date confirmed........ 61964
95.605 Amended.......... *10794
95.611 (a) amended.......... *10794
95.612 Added.......... *10794
95.613 Amended.......... *10794
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100a.170 (c) table amended........ *28669
100a.616 Added.......... *58013
100a.690 Added.......... *58013

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100b.126 Added	*22650
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100b.128 Added	*22650
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100b.131 Added	*22651
100b.132 Added	*22651
100b.133 Added	*22651
100b.134 Added	*22651
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104.118 Added	*30636
104.119 Added	*30636
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104.263 Removed	*22530
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104.289 Removed	*22530
104.291 Removed	*22530
104.292 Removed	*22530
104.301 (a) and (b) removed; (c) and (d) revised	*22530
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104.553 Removed	*22530
104.612 (b) removed	*22530
104.634 Removed	*22530
104.803 (b) removed	*22530
105.4 Revised	*22530
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105.107 Removed	*22530
105.109 (a) revised	*22530
105.204 Revised	*22530
105.206 Amended	*22531
105.209 Removed	*22530
105.210 Removed	*22530
105.506 (c), (d), and (e) removed	*22530
105.507 Removed	*22530
105.604 (a) revised; (b) and (e) removed	*22531

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105.605 (a) removed effective pending congressional review	*22530
105.614 (a), (c)(4), and (e) removed	*22530
105.624 (a), (c), and (d) removed	*22530
105.625 Removed	*22530
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116a.34 Added	*22656
116a.35 Added	*22656
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116a.38 Added	*22657
116a.39 Added	*22657
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116b.23 (b) removed	*22531
116b.32 (b) removed	*22531
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121a.451 Revised	*22531
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121a.581 Removed	*22531
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121a.590 Removed	*22531
121a.591 Removed	*22531
121a.592 Removed	*22531
121a.593 Removed	*22531
121a.601 Removed	*22531
121a.602 Removed	*22531
121a.750 (a) revised	*7551
121a.751 (a)(1) and (b) revised	*7551
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121d.17 Introductory text amended	*22532
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148.5 Added	*22535
148.12 (a) revised	*22535
148.22 (a) revised	*22535
148.32 (a), (b) introductory text and (2) revised; (d) removed	*22535
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155.11 (a) introductory text revised; (b)(1) and (c) removed	*22536
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155.14 Introductory text revised	*22536
155.15 Introductory text revised	*22536
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157.5 (a) introductory text and (3)(vi) revised; (a)(2)(iii), (3)(i) and (vii), (4), and (b) removed	*22537
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157.11 (a) introductory text revised; (b)(2) and (c) removed	*22537
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